COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-11459

BARNSTABLE COUNTY

COMMONWEALTH
Appellee

v.

ROBERT UPTON
Defendant-Appellant

ON APPEAL FROM A
JUDGMENT IN THE
BARNSTABLE SUPERIOR COURT

BRIEF FOR THE COMMONWEALTH

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April, 2019

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COMMONWEALTH'S BRIEF

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ISSUES PRESENTED

I. WHETHER THE MOTION JUDGE WHO ALSO SERVED AS THE TRIAL JUDGE PROPERLY DENIED THE DEFENDANT'S SECOND MOTION FOR A NEW TRIAL, FINDING THAT THERE WAS NO UNDISCLOSED COOPERATION AGREEMENT BETWEEN CHRISTOPHER MANOLOULES AND THE COMMONWEALTH, AND FURTHER, THE JUDGE PROPERLY FOUND THAT THERE WAS NOT A *BRADY* VIOLATION.

II. WHETHER THE JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL WHERE CHRISTOPHER MANOLOULES'S TESTIMONY AT THE CIVIL WRONGFUL DEATH TRIAL DOES NOT CAST DOUBT ON THE DEFENDANT'S CONVICTION.

III. WHETHER THE JUDGE WAS NOT REQUIRED TO HOLD AN EVIDENTIARY HEARING ON THE MOTION FOR A NEW TRIAL, AND THE JUDGE PROPERLY DENIED THE MOTION FOR A NEW TRIAL, WHERE THE DEFENDANT DID NOT RAISE A SUBSTANTIAL ISSUE.

IV. WHETHER THIS COURT SHOULD NOT EXERCISE ITS EXTRAORDINARY POWER UNDER G.L. c. 278, §33E TO REVERSE OR REDUCE THE VERDICT OF MURDER IN THE FIRST DEGREE BECAUSE THE JURY'S VERDICT WAS CONSONANT WITH JUSTICE.

STATEMENT OF THE CASE

1. On January 8, 2010, the defendant, Robert L. Upton, was arraigned on one count of murder (G.L. c. 265, §1); one count of armed assault with intent to murder with a firearm (G.L. c. 265, §18[b]); one count of aggravated assault and battery with a dangerous weapon (G.L. c. 265, §15A); and one count of armed assault in a dwelling (G.L. c. 265, §18A).[1] (R.A.723)

2. On September 8, 2011, the defendant filed a motion to suppress evidence, accompanied by a memorandum of law. (R.A.728)

3. On March 1, 2012, an evidentiary hearing on the defendant’s motion to suppress evidence was heard by Rufo, J. (R.A.729)

4. On March 21, 2012, the motion judge denied the defendant’s motion to suppress evidence in a Memorandum of Decision and Order. (R.A.729)

[1] Citation format will be as follows: to the trial transcript as “(Vol/Pg),” to the defendant’s brief as “(D.B.#), to the record appendix as “(R.A.#), and to the Commonwealth’s Addendum as “(CA.#).” The Commonwealth adopts the same citation format for the defendant’s interview, trial exhibits I and J in the defendant’s Vol. I. Appendix.

5. On January 7, 2013, jury trial began in the Barnstable Superior Court. (R.A.731)

6. On January 7, 2013, the defendant filed a motion in limine alleging that there was an undisclosed promise, inducement, or reward to Christopher Manoloules. (R.A.731) The Commonwealth filed a disclosure of promise, inducement, and rewards for Christopher Manoloules, the same document that was filed in *Commonwealth v. Treefon Manoloules,* as well as relevant trial transcript portions. The Commonwealth represented that no undisclosed promises, inducements, or rewards existed. (CA.74-78, R.A.732)

7. On January 17, 2013, a jury returned guilty verdicts on the count of first degree murder based upon deliberate premeditation and felony murder, the count of aggravated assault and battery with a dangerous weapon, and the count of armed assault in a dwelling. (R.A.734) The jury found the defendant not guilty of the count of armed assault with intent to murder. (R.A.734)

8. On January 18, 2013, the defendant was sentenced to life without the possibility of parole for the first degree murder conviction. (R.A.734) On the conviction for aggravated assault with a dangerous

weapon, the defendant was sentenced to 14-15 years at MCI-Cedar Junction, to run concurrently with the sentence for the murder conviction. On the conviction for armed assault in a dwelling the defendant was sentenced to life, to run concurrently with the sentence for the murder conviction. (R.A.734)

9. On January 24, 2013, the defendant filed a notice of appeal. (R.A.735)

10. On December 31, 2014, the defendant filed his motion for a new trial in the Supreme Judicial Court and the case was remanded to the Barnstable Superior Court. (R.A.735)

11. On January 20, 2015, the defendant's motion for a new trial was docketed in the Barnstable Superior Court. (R.A.735)

12. On November 17, 2015, the defendant's first motion for a new trial was denied by Nickerson, J. (R.A.736)

13. On February 8, 2018, the defendant filed a second motion for a new trial. (R.A.737)

14. The Commonwealth filed its opposition to the second motion for a new trial on June 6, 2018. (R.A.737)

15. On July 24, 2018, the trial judge, Nickerson, J., denied the defendant's second motion for a new trial without a hearing. (R.A.737)

16. The defendant filed a timely notice of appeal. (R.A.738)

STATEMENT OF FACTS

Upton Trial[2]

The defendant Robert Upton was the uncle of Christopher Manoloules, and the brother-in-law to Treefon Manoloules (7/1069-1070). The defendant's sister, Deborah Manoloules, was married to Treefon (7/1069-1070). The victim, Aris Manoloules, was the brother of Treefon, and was Christopher's uncle (7/1073). The victim was related to the defendant by marriage only, he was the defendant's sister's brother-in-law.

On Wednesday September 30, 2009, at approximately 5:30 p.m., the victim was found dead in his home at 25 Ripple Cove Road in Hyannis (2/285, 297, 3/329). He had been shot four times (3/426), including one entrance wound to the back of the head (3/426).

[2] For the purposes of clarity, Christopher Manoloules will be referred to as "Christopher," and Treefon Manoloules will be referred to as "Treefon."

Christopher, who was 17 at the time (4/534), first met with the defendant sometime in September, 2009, concerning Christopher's failure to go to school and his drug use (4/555-557). The defendant was asked by his sister Deborah to mentor Christopher regarding school attendance and sobriety. (7/1095). During one of the visits, the defendant told Christopher that the defendant needed $150,000, and the defendant asked Christopher how fast he could make that money selling drugs (4/557). The defendant said he owed $150,000 to another man who was going to kill the defendant's daughter if the defendant did not pay up (4/557-558).

Dylan Laird was present when Treefon and Christopher would have conversations with the defendant about getting money (6/974)[3]. Christopher was always present, and Treefon was present for some of the discussions (6/974).

The defendant claimed to have keys to an auto dealership, and suggested they steal cars from that dealership (6/975). Treefon and Christopher were both present for this discussion (6/975).

[3] Laird testified pursuant to a disclosed grant of immunity by the Commonwealth.

Another idea that the defendant and Christopher came up with was to rob a house (6/976). Laird went along in a car with the defendant and Christopher as they were surveilling potential houses to rob (6/976).

Laird was present when Christopher, the defendant, and Treefon discussed killing the victim (6/976-977). There were talks of overdosing the victim, shooting him, and strangling him (6/977). When Laird was asked to go along with them, but he declined to participate. (6/979)

At some point, Treefon asked the defendant to buy a gun (4/568). Present at this conversation were Treefon, the defendant, and Christopher (4/569). Treefon said he could not get a gun because it would be too obvious if he obtained a gun and his brother Aris turned up dead (4/569). It was agreed that Treefon would pay the defendant over five days if he killed the victim: there would be four daily payments of $40,000, and one payment of $5,000 (4/570). The defendant would be paid a total of $165,000. It was also discussed that Treefon would give the defendant money to purchase a handgun shortly before the murder.

There was a further meeting among Treefon, the defendant, and Christopher at the Cheng Du restaurant

(4/575). Treefon told the defendant that the killing would have to take place on Cape Cod, and that the defendant had to get a gun that day (4/575). Back at home later that day, Treefon told Christopher that his job was to get the defendant into the victim's house (4/575-576). It was also Christopher's job to steal jewelry from the victim (4/577).

The defendant purchased a Ruger P85 handgun (5/850). The defendant bought the gun on September 29, 2009 (5/866-867).

At Treefon's request, Christopher called the victim and lured him to Cape Cod by telling him that Christopher was there on Cape Cod and wanted to see him (4/578).

Later that day the defendant met Christopher at the empty lot across from the Manoloules house in Southborough. (4/585). The defendant had a gun in a black case (4/586). The defendant and Christopher drove to Cape Cod to the victim's house and parked nearby (4/589). The defendant carried the gun tucked into his pants (4/592). The defendant was wearing both doctor's gloves and sports "lifting" gloves (4/592).

The two walked to the victim's house and entered through the front door (4/594). The victim was sitting in one of the rooms watching the Red Sox game (4/594). The defendant and Christopher sat down (4/594).

After asking the victim for a loan and being turned down, Christopher excused himself and said that he needed to go to the bathroom (4/595). At this time, Christopher snuck into three other rooms on that floor (4/595). Christopher went through the drawers in these rooms, but there was nothing for him to take (4/595-596).

Christopher went back to where the defendant and the victim were sitting, and called the defendant into the kitchen (4/596). Christopher told the defendant that there was no jewelry in the house (4/596). The victim came into the kitchen and gave both the defendant and Christopher bottles of water (4/596). The victim then went back into the room where he was watching the baseball game and sat down (4/597). The defendant pulled out the gun, which had been tucked in the back in his pants (4/597). Christopher saw the defendant pull back the hammer and unlock the safety (4/597). The defendant did not say anything to

Christopher, but Christopher was urging the defendant to leave (4/597).

The defendant walked back into the room where the victim was seated (4/597). The defendant pointed the gun at the victim, who was saying, “No, no, please.” (4/598). Christopher turned away, but heard shots and screaming (4/598). He thought he heard four shots (4/598).

Christopher started walking toward the stairs to leave (4/598). The defendant came out of the room and said, “It’s unfucking believable the amount of blood coming out of this guy’s head.” (4/598).

The two left the house (4/599), but had to return because Christopher had left a beach chair behind at the victim’s house (4/600-601). The defendant drove to an exit off the highway, where he and Christopher disposed of the clothing they had been wearing, plus the beach chair (4/604).

Erin O’Malley was the defendant’s girlfriend (5/809), and by May, 2009, the defendant began living almost full-time with O’Malley (5/813). As of September, 2009, the defendant was also still married to Wendy Upton, who lived in Ipswich (8/1142).

On September 29, 2009, Erin O'Malley was texting the defendant because he was not home, and he should have been home hours earlier (5/821-822). It was not normal that the defendant was not returning her text messages (5/822). O'Malley did not hear from the defendant until 11:30 that evening, when the defendant told her that he had actually been in the house while she was sleeping, but he had left to get a loaf of bread (5/822). The defendant did not return home until 1:30 a.m. (5/823).

The next day, the day after the shooting, when Erin O'Malley returned home from work at approximately 2:00 p.m., she saw a disassembled gun on the table as the defendant was cleaning it (5/824-825). She asked the defendant to get the gun out of her house and the defendant agreed (5/825). The gun was disassembled and sitting on a brown paper bag, with a box of ammunition next to it (5/825). When Erin O'Malley returned from walking her dogs approximately 15 minutes later the gun and the ammunition were gone (5/825).

On October 5, 2009, Erin O'Malley and her sister Meghan went into the basement of her house (5/828). Meghan found the gun in hidden in O'Malley's basement

(5/828). The gun was in a black case (5/831). The box of ammunition had four bullets missing (5/831).

At the scene of the murder, the police recovered four spent shell casings (6/945-947), one spent projectile (6/944), and one jacketed projectile (6/948). The defendant's firearm recovered from Erin O'Malley's basement was determined to be an operable firearm (6/954). Testing determined that all four spent shell casings, the spent projectile, and the jacketed projectile were fired from the defendant's firearm (6/957).

Dr. Henry Nields conducted the autopsy of the victim on October 1, 2009. (3/422) He observed four gunshot wounds. (3/425-426) He observed an entrance wound to the chin, a gunshot entrance wound to the left lower chest, a gunshot entrance wound to the right upper chest, and a gunshot entrance wound to the back of the head. (3/426) He noted two gunshot exit wounds to the back. (3/426) The victim had scrapes on his skin, including an abrasion on his forehead, the bridge of his nose, and a contusion on his right eye. (3/427) Nields recovered two spent projectiles and turned them over to police. (3/439) Nields observed fixed lividity in the victim’s front, leading him to

conclude that the body was lying facedown for several hours. (3/435)

The defendant's statements

The Commonwealth played the recording of the defendant's interview with police on October 1, 2009. The defendant initially denied any knowledge of the crime, and he also denied being on Cape Cod. (I-31) He stated that on September 29, 2009, he bought a 9mm Ruger handgun and 50 rounds of ammunition. He put the items in his trunk. (I-26, 42)

The defendant stated the next day he noticed his gun missing and more mileage on his car than expected. (I-58) He thought Christopher or his friends might have driven his car. (I-59-60)

The defendant's story then progressed and he said that on September 29, 2009, he drove Christopher to a parking lot near the water on Cape Cod. He said that he waited for twenty minutes while Christopher had to go meet someone. (J-8, 10-11, 27). The defendant said that Christopher returned in a tense state, and he drove him back to Treefon's house. (J-60-61) The defendant said that he thought the gun was still in the trunk when they were on Cape Cod. He did not notice the gun was missing. (J-29, 52)

The defendant's case

The defendant's daughter, Hailey, testified for the defendant. (8/1160) She recalled overhearing her parents prior to her 16th birthday in September talking about a phone call. Christopher's family reached out and asked for the defendant to help Christopher, as he was having a hard time. (8/1161) Hailey recalled the defendant was home "occasionally" at night, she did not know he had a girlfriend, and she did not know her life was allegedly in danger due to an unpaid loan. (11/1163)

SUMMARY OF THE ARGUMENT

I. The motion judge, also serving as the trial judge, did not err when he denied the defendant's motion for a new trial, where he found that there was no undisclosed cooperation agreement. The judge found the testimony of Christopher at the civil trial was not credible, where his family stood to benefit financially as a result of the trial. Further, the judge found the fact that his charge of first degree murder was reduced to manslaughter was not indicia of an agreement. The plea hearing also did not contain any evidence of an undisclosed agreement. (Pp.22-39)

II. The motion judge correctly found that the civil trial testimony of Christopher Manoloules does not qualify as newly discovered evidence. The flaw in the defendant's claim is that the defendant was given an opportunity to cross-examine Christopher, and new civil testimony does not offer a measure of support in the defendant's case. Further, there was no evidence a promise, inducement, or reward was ever communicated to the defendant. (Pp. 39-44)

III. Where the defendant's motion for a new trial does not raise a substantial issue, the judge was not required to hold an evidentiary hearing. Further, all of the issues raised can be addressed on the record. (Pp.45-48)

IV. The defendant is not entitled to relief under G.L. c. 278, §33E. The record reflects that there is no miscarriage of justice. The defendant was hired by his brother-in-law, Treefon, to kill the victim. Aris inherited their mother's estate, a significant asset. The defendant and Christopher drove to Hyannis, and unsuccessfully searched for jewelry to steal. The defendant then pulled out a handgun he purchased the day prior, and cocked the trigger. The victim pleaded for his life. The defendant then shot the victim

four times. The pair drove back to Treefon's house. The defendant's motive was solely for the defendant's financial gain and profit, to continue the façade of his life.(Pp.48-50)

ARGUMENT

I. THE MOTION JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL, WHERE THE DEFENDANT CANNOT ESTABLISH THAT THERE WAS AN UNDISCLOSED AGREEMENT WITH CHRISTOPHER MANOLOULES.

A. Standard of Review.

Under Mass. R. Crim. P. 30(b), a trial judge may grant a new trial at any time if it appears that justice may not have been done. *Commonwealth v. Chatman,* 473 Mass. 840, 845 (2016), quoting Mass. R. Crim. P. 30(b). "Judges are to apply the standard set out in Mass. R. Crim. P. 30(b) rigorously, and should only grant a motion if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth." *Commonwealth v. Fanelli,* 412 Mass. 497, 504 (1992).

In reviewing the denial of a motion for a new trial, the Court reviews for "a significant error of law or other abuse of discretion." *Commonwealth v. Forte*, 469 Mass. 469, 488 (2014). Furthermore, it is within the judge's discretion to deny a Motion for New Trial

without hearing if no substantial issue is raised. *See Commonwealth v. Goodreau*, 442 Mass. 341, 248-349 (2004). "Under the abuse of discretion standard, the issue is whether the judge's decision resulted from 'a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives.'" *Commonwealth v. Kolenovic,* 471 Mass. 664, 672 (2015). The motion judge also served as the trial judge, therefore, his findings are given substantial deference. *Commonwealth v. Nieves,* 429 Mass. 763, 771 (1999).

B. The motion judge properly found that no undisclosed cooperation agreement existed between the Commonwealth and Christopher Manoloules.

The motion judge properly denied the defendant's motion for a new trial, holding that the Commonwealth did not have an undisclosed cooperation agreement with Christopher Manoloules. (CA.54-70) While the Commonwealth agrees that it had a duty to provide the terms of any cooperation agreement, promises, inducements, or rewards with a witness that the Commonwealth intended to call at the defendant's trial, See Mass. R. Crim. P. 14(a)(1)(A)(ix); *Commonwealth v. Burgos*, 462 Mass. 53, 62 (2012); the

defendant failed to demonstrate that the Commonwealth did not fully satisfy its responsibility, where no undisclosed agreement existed.

An "inducement" consists of any statement which "reasonably implies that the government . . . is likely to confer or withhold future advantages . . . depending on [the] witness's future cooperation." *Commonwealth v. Schand,* 420 Mass. 783, 792 (1995), quoting *United States v. Buendo,* 701 F. Supp. 937, 942 (D. Mass. 1988), aff'd sub nom. *United States v. Penta,* 923 F.2d 839 (1st Cir. 1990). However, here there were no undisclosed promises, inducements, or rewards.

This issue was explored in the Grand Jury, during a motions hearing, at the defendant's trial, during Christopher's plea, and again during the defendant's second motion for a new trial. Christopher testified at the trial that he was not offered any undisclosed promises, inducements, or rewards. (4/617, 5/776-777) He told the jury he had no understanding that he would receive beneficial treatment. (5/777) He told the jury he was testifying because it was the right thing to do. (5/778)

There is no evidence to support the defendant's claim that Christopher received an undisclosed benefit for his testimony. *See Commonwealth v. Goitia,* 480 Mass. 763 (2018). The defendant has not established any undisclosed agreement existed. *Compare Commonwealth v. Hill,* 432 Mass. 704, 715-716 (2000)(prosecutor violated *Brady* by failing to disclose "loose agreement" with witness to dismiss or reduce pending charges); *Commonwealth v. Gilday,* 382 Mass. 166, 176-177 (1980)(prosecutor who makes arrangement with the witness's attorney for favorable treatment has duty to disclose under *Brady*).

The defendant's trial was on January 7, 2013, and Christopher entered a plea of guilty to manslaughter on May 29, 2013. The prosecutor succinctly described the circumstances and procedure in how Christopher's case was handled during his plea hearing:

> [T]he Commonwealth's position has always been that he was used in this situation; you know, not completely unknowingly but certainly not to the extent that I think he thought this was all going to play out in the end.
>
> He, at the very early stage after this case became known to the police, offered to cooperate with the authorities in the matter, and he, in fact, testified in two of the trials that took place in this Barnstable Superior Court, your Honor.

> And, for the record, there was never an offer made to Mr. Manoloules or his attorney during the pendency of either of those two cases. In fact, no discussions concerning a change of plea were ever openly discussed at all until after the completion of the trial of Robert Upton, which was the second in time of trials.
>
> With that being said, your Honor, the Commonwealth, in light of the fact that he did cooperate and he did, in fact, testify in those two cases, agreed to reduce this to a manslaughter. . .
>
> (CA.98-99)

Despite the evidence to the contrary, the defendant claims that there was an undisclosed agreement between co-defendant Christopher, and therefore, a violation under *Brady v. Maryland,* 373 U.S. 83, 87 (1963). The motion judge explicitly rejected this claim, and found that there was no *Brady* violation, where there was no evidence of an undisclosed cooperation agreement. (CA.67)

There is no evidence that the Commonwealth entered into an inducement relating to the murder charge with Christopher prior to his testimony against the defendant, absent the disclosed agreement to not use his testimony against him in a future proceeding. The fact that Christopher entered into an agreed upon plea at the conclusion of the trials, does not amount

to a "substantial showing" that there was a pretrial agreement. See *Commonwealth v. Morgan,* 449 Mass. 343, 365 (2007) (evidence that the prosecutor and state police helped witness with his immigration problems after the defendant's trial did not amount to substantial showing of pretrial agreement); *Commonwealth v. DeCicco*, 51 Mass. App. Ct. 159, 163-164 n.3)(2001)(later reduction of charge against witness was not substantial showing that Commonwealth had "tacit agreement" with witness at time of defendant's trial), review denied, 435 Mass. 1101 (2001). Although Christopher may have hoped that the testimony at the defendant's trial would provide a benefit, his hopes and wishes do not qualify as an inducement. *Schand,* 420 Mass. at 792.

1. Christopher's self-serving testimony at the wrongful death civil trial does not establish an undisclosed agreement.

The defendant asserts that Christopher's testimony during the civil wrongful death trial establishes the existence of an undisclosed agreement. The defendant has not supported this claim with anything other than Christopher's testimony at the civil trial.

Christopher testified at the civil trial that he was given an undisclosed agreement by the prosecutor-yet could not support his claim with times, dates, or any written documentation or affidavits from his attorney. (R.A.480) However, he also testified regarding his motive at the civil trial. "And you want to help [your father] in this lawsuit if you can, correct?" (R.A.474) "I think he deserves to win." "So you want to help him?" (R.A.474) “yeah.” (R.A.474)

Christopher’s testimony occurred in the context of a civil wrongful death action brought by his aunt Irene Manoloules on behalf of Aris Manoloules’s estate. *Irene Manoloules v. Treefon Manoloules*, et al., 1281CV3875. The victim’s estate was bequeathed to both Irene and Treefon, in equal shares. Irene filed a civil action on behalf of the victim, looking for damages on behalf of the victim from all three co-defendants: Treefon, Christopher, and the defendant.

The judge properly concluded, after reviewing the civil trial transcripts that “Christopher’s civil testimony regarding an informal agreement was a convenient falsehood, a transparent device fleetingly employed to protect his family’s financial interests and cast aside once Treefon was secure from civil

liability.” (C.A.65) The subsequent analysis supports the judge’s denial of the motion for a new trial, and sheds light on the weakness of the defendant’s showing and the motivation behind Christopher’s civil trial testimony.

Christopher had a motive at the civil trial to protect his family’s interests. As the motion judge noted, “the outcome of the civil trial determined whether Christopher’s father, and by extension his mother and sisters, would effectively lose his portion of the inheritance which is at the center of this sorry tale.” (CA.63)

The judge noted this motive in his denial of the motion for a new trial. “Christopher had a substantial motive to protect his family’s financial interests by undermining the credibility of his own prior testimony that his father was the unrelenting force behind the murder plot.” (CA.63-64) The judge noted that Christopher testified in the civil trial that his father “deserved to win.” (CA.64)

Lastly, the judge noted, “[t]he final blow to the credibility of Christopher's civil testimony comes from the telling silence that follows it.” (CA.64) The judge recognized that the defendant has not provided

an affidavit from Christopher's trial attorneys, nor has he provided any details regarding these secret communications in support of his motion for a new trial. (CA.64) The only evidence that there was an undisclosed agreement comes from Christopher himself, whose credibility is undermined by his self-interest.

Further, the defendant has not outlined any attempts to obtain an affidavit from Christopher's plea attorney. "When weighing the adequacy of the materials submitted in support of a motion for a new trial, the judge may take into account the suspicious failure to provide pertinent information from an available and expected source." *Goodreau*, 442 Mass. 341, 354 (2004); *Compare Commonwealth v. Rice*, 441 Mass. 291 (2004)(holding that defendant's lack of an affidavit from trial counsel shows his claims are "speculative").

2. Chris's subsequent plea to manslaughter does not undermine his trial testimony and warrant a new trial, as it is cumulative impeachment evidence.

The defendant asserts that a new trial should be granted because "the fact that Chris plead guilty to manslaughter and accepted his culpability for Aris's murder, undermines all his trial testimony." (D.B.46)

The defendant asserts that according to Christopher's plea, he is a "joint venturer in Aris's homicide." (D.B.51) There is no evidence to support the defendant's claim that the charges were amended prior to the defendant's trial as a reward for Christopher's testimony. *See Goitia,* 480 Mass. at 772-773.

The judge rejected this claim. The judge stated in a footnote, that it did not warrant significant discussion, where he recognized that cumulative impeachment evidence is not normally the basis for a new trial. "Evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial." *Commonwealth v. Sullivan,* 478 Mass. 369, 383 (2017). Any further impeachment of Christopher by the discussion of his involvement in the murder would have been "cumulative [not] potentially dispositive." *Commonwealth v. Sarmanian,* 426 Mass. 405, 407 (1998). Any additional impeachment evidence, unsupported by details and uncorroborated by additional evidence, would not have influenced the jury's conclusion because Christopher's testimony was very much called into question by defense counsel on cross-examination. Christopher testified for over two days.

Defense counsel cross-examined Christopher extensively on his involvement, and argued in closing that Christopher was responsible for the murder of his uncle. (8/1184-1211) The defendant's closing argument quoted Christopher's statement to Laird, "I did it," both at the beginning and end of his argument. (8/1184, 1211) The closing argument pinpointed the inconsistencies in, and challenged the believability of, Christopher's testimony. (8/1207)

The defendant relies on *Commonwealth v. Hill* for the proposition that the Commonwealth's post-testimony reduction of charges "strongly supports the existence of an agreement" with Christopher. *Hill,* 432 Mass. at 715-716. (D.B.38) The defendant raised this same claim in his motion for a new trial, and it was rejected by the motion judge. (CA.65) The judge noted that the facts of *Hill* are markedly different from the case at bar. (D.B.12) The judge opined that in *Hill,* there was "overwhelming evidence" of an undisclosed agreement, where the prosecutor testified at the witness's plea hearing that if he cooperated she would take it into consideration, and an affidavit was submitted where the prosecutor told witness's counsel that charges would be dropped. *Id*. at 715-716. (CA.65)

Further, the witness in *Hill* testified to the elements of his pending charges during the defendant's trial, and police had overwhelming evidence of his guilt. *Id.* at 712. Whereas here, Christopher did not admit to any of the elements of his first degree murder charge during his testimony at the defendant's trial.

3. The affidavit and motion filed by trial counsel, alleging an over-heard internal conversation between a prosecutor and a third party, does not amount to undisclosed promises, inducements, or rewards.

The defendant relies on an affidavit and motion filed by trial counsel, alleging a secret agreement based on a conversation overheard by an attorney unrelated to the case, to support his claim that there was an undisclosed agreement. (CA.71-73) The defendant filed a motion in limine for the production of the records of any agreement. (CA.71-73) The defendant's motion was accompanied by an affidavit drafted by an attorney unrelated to the case, who stated she overheard a prosecutor discussing Christopher's testimony with a third party. (CA.71-73) The prosecutor, who was not the trial prosecutor, allegedly told the third party that Christopher was going to receive a reduction in charge to second degree murder. (CA.71-73)

In response, the judge questioned the trial prosecutor regarding the existence of a secret agreement. (2/255) The judge asked the prosecutor about the existence of any agreement, and it was repeatedly denied. The judge asked the Commonwealth, "if anybody said to [Christopher], kid, you are getting second for this?" The prosecutor replied, "No, not by the Commonwealth. Not by me." (2/255) The judge questioned him further, regarding "the fact that an ADA according to Attorney McLaughlin seems to know this kid is getting a second out of this case." (2/256) The prosecutor responded, "it's not true. But even if it was, that would have to be communicated to Christopher . . . and he was under oath on two separate occasions and indicated that's not the case." (2/256) The judge asked, "[h]as that [he will get a second] be communicated to Christopher's or his lawyer?" (2/256) The prosecutor replied with an unequivocal, "never." (2/256)

The prosecutor stated that the only agreement in place with Christopher had been discussed in Treefon's trial, and disclosed to the defendant's counsel. (2/260) The prosecutor indicated the only agreement was limited to not using Christopher's testimony and

statements to the State Police against him in future proceedings, except for perjury. (2/261; CA.74-78)

The defendant now claims that the affidavit establishes that there was a secret, undisclosed agreement. (D.B.33) The same judge who inquired of the prosecutor noted in the denial of the motion for a new trial, "[t]he prosecutor's specific, credible, and repeated denials satisfied this jurist that no secret agreement existed." (CA.63) He stated, "the prosecutor's credibility is not diminished by Christopher's recent civil testimony asserting the contrary." (CA.63) Where the motion judge found the prosecutor's statement was not undermined by Christopher's testimony, the defendant cannot succeed on this claim.

There is no evidence, absent Christopher's self-serving testimony at the civil wrongful death trial, that there was a secret, undisclosed agreement.

The judge correctly held that the Commonwealth's case "did not wholly depend on Christopher's testimony." (CA.67) As noted, the jury heard Laird's testimony that the defendant discussed a plan to kill the victim with Treefon and Christopher, the defendant told police that he drove to Hyannis with Christopher,

the murder weapon matched the forensics at the scene of the victim’s death, and the defendant texted the car salesman shortly before the murder that he was getting at least “$77,000” from his brother in law, and would know more at 10:00 A.M. The judge found “this web of evidence was strongly persuasive to the jury.” (CA.68) Evidence supporting the defendant’s conviction was strong. See *Commonwealth v. Ellis,* 475 Mass. 459, 480 (2016)(“The determination of whether newly discovered evidence would have been a real factor in the jury’s deliberations require that the new evidence be considered in the light of the totality of the evidence presented at trial. . .”).

The defendant argues that the existence of the secret agreement is proven by the prosecutor's statement to the plea judge that "no discussions concerning a change of plea were ever *openly* discussed at all until after the completion of the trial of Robert Upton." (D.B.39; CB.99)) The term "openly" must be considered in the context of the prosecutor's immediately preceding statement that "there was never an offer made to Mr. Manoloules or his attorney during the pendency of either Treefon's or the defendant's] cases." (CA.99)

The judge correctly found that in reviewing these sentences, “the term ‘openly’ was not reference a secret agreement with Christopher or his counsel, but instead likely referred to any internal, confidential discussions amongst prosecution staff regarding an acceptable sentencing recommendation.” (CA.66)

The motion judge, who as the trial judge observed Christopher testify, noted that “in this jurist’s view, Christopher’s demeanor at the defendant’s trial and his testimony casting himself as repeatedly trying to save his uncle and "do the right thing," had already raised significant questions in the jury's mind as to his motive to testify.” (CA.69) The conclusions of a trial judge who had observed [the witness’s] demeanor must be afforded deference.” *Commonwealth v. Alves,* 50 Mass. App. Ct. 796, 805 (2001). Here, the judge’s observations of Christopher’s demeanor should be given deference.

4. The statements at Christopher’s plea by his defense counsel do not amount to undisclosed promises, inducements, or rewards, as the defendant takes the statement out of context.

Defense counsel parses Christopher’s plea transcript, and argues that the statement of Christopher's plea counsel that the prosecutor was "a

man of his word" refers to the prosecutor upholding an alleged secret agreement. (D.B.40-41) The motion judge stated that “[t]he defendant's interpretation defies reason, as it requires the conclusion that plea counsel was praising the prosecutor's honesty in sticking to a putative secret agreement just moments after hearing the prosecutor explicitly deny the existence of the agreement to the court.” (CA.66)

Christopher’s plea counsel’s comment cannot be viewed and understood in isolation, and must be read in the context of his immediately preceding statements.

Plea counsel’s comment followed a discussion of the prosecutor's "tak[ing] very seriously" several threats against Christopher and "instigat[ing]” "the transfer of [Christopher] to his present place of incarceration." (CA.66) The motion judge reviewed the transcript and this statement, and held that “it is likely that the ‘word’ referenced by plea counsel was the prosecutor's statement that he would assist in securing Christopher's transfer to a safer facility.” (CA.66) The statement was not in reference to some undisclosed, non-existent agreement, it was regarding transferring Christopher to a different facility.

The defendant also argues that plea counsel's later statement that Christopher "is getting some quid pro quo . . . for his cooperation with the Commonwealth" also references the existence of the alleged secret agreement. (D.B.38-39) Once again, the context of the statement does not rationally support the defendant's interpretation. This phrase was uttered as part of a request of the plea judge to provide consideration by sentencing lower than the Commonwealth's recommendation: "I ask for some consideration, more than what the State as (sic) enumerated for you, to show that he's—he's getting some quid pro quo . . ." (CA.66-67) No such judicial consideration would be required if, as the defendant suggests, the Commonwealth was bound by and adhered to a secret cooperation agreement. (CA.66-67)

The motion judge properly denied this claim, where the record does not support the defendant's allegation of a secret, undisclosed agreement.

II. THE MOTION JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION FOR A NEW TRIAL, WHERE THE JUDGE FOUND THAT CHRISTOPHER'S TESTIMONY AT THE CIVIL TRIAL WAS NOT CREDIBLE, DOES NOT CAST DOUBT ON THE DEFENDANT'S CONVICTION.

A. Standard of Review.

This Court reviews for an abuse of discretion, as it is within the judge's discretion to deny a motion for a new trial without a hearing if no substantial issue is raised. *Goodreau*, 442 Mass. at 248-349.

"A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction." *Commonwealth v. Grace,* 397 Mass. 303, 305 (1986). Evidence is newly discovered if it was "unavailable at the time of trial and could not have been discovered with reasonable diligence." *Commonwealth v. LeFave*, 430 Mass. 169, 176 (1999). Newly discovered evidence casts real doubt on the justice of the conviction if "there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial." *Grace,* 397 Mass. at 306. In determining whether the motion judge erred in his denial of a motion for a new trial based on newly discovered evidence, this Court "examine[s] the motion judge's conclusion only to determine whether there has been a significant error of law or other abuse of discretion." *Id.* at 307. The Court "accord[s] special deference to the action of a motion judge who

was also the trial judge." *Commonwealth v. Shuman*, 445 Mass. 268, 272 (2005).

B. Christopher's civil trial testimony is not newly discovered evidence, and moreover, even if it was, would not cast doubt on the justice of the conviction.

The fundamental flaw in the defendant's claim is that Christopher testified at the defendant's trial, and was cross-examined extensively on the issue of an undisclosed plea agreement by defense counsel. (5/777-778) The motion judge correctly held that Christopher's civil trial testimony does not qualify as newly discovered evidence, unless the defendant can make a substantial showing that an agreement did exist at the time and was concealed from the defendant by the prosecutor. (CA.61) That Christopher testified to a different version of events at a different hearing does not transform the later testimony into newly discovered evidence. *Compare Commonwealth v. Green,* Massachusetts Appeals Court, No. 10-P-2086, slip op. at 92 Mass. App. Ct. 1102 (August 4, 2017) rev. denied, 478 Mass. 1104 (2017)(witness's subsequent testimony at co-defendant's trial, describing a differing of events, does not constitute newly

discovered evidence where witness was specifically cross-examined on that same issue).

Defense counsel conducted a lengthy cross-examination of Christopher Manoloules. Defense pointed out Christopher's two lawyers to the jury. (4/625) Defense counsel asked Christopher in multiple forms whether he was given or offered a plea deal in exchange for his testimony at the trial. (5/776-778) He also asked Christopher, "has there been anything that wasn't said, but is understood in your mind," meaning, if Christopher had an "understanding" that he was going to receive a plea deal. (5/776) Defense counsel also had Christopher admit that he hired his new attorneys and shortly after he spoke with the Massachusetts State Police in June of 2009. (5/776) Christopher stated that he was not sure if he would be surprised if he was tried for murder in the future. (5/777-778)

The judge found that Christopher's civil trial testimony does not constitute newly discovered evidence. "[T]he motion judge properly '[took] into account his knowledge of what occurred at trial [in order to] assess questions of credibility." *Commonwealth v. Spray*, 467 Mass. 456, 472

(2014)(further quotations omitted). See *Grace, supra* at 310 (“There is no doubt that a motion judge should give serious consideration to the credibility of a recanting witness’s new testimony”). Further, if Christopher “were to testify at a new trial, his credibility would be damaged in such a way by earlier testimony that his new testimony would be relatively worthless.” *Commonwealth v. Waters*, 410 Mass. 224, 231 (1991).

Further, a judge is not required to credit affidavits submitted in support of a motion for a new trial, and "may evaluate them in light of factors pertinent to credibility, including bias, self-interest, and delay." *Commonwealth v. Torres,* 469 Mass. 398, 403 (2014).

The motion judge addressed this issue in the denial of the motion for a new trial. The judge held that “the defendant raises two issues without citation to any case law, which do not warrant significant discussion.” (CA.60) The judge noted that even if Christopher’s plea of guilty was inconsistent with his trial testimony, “this would merely constitute cumulative impeachment evidence, which is not

ordinarily the basis of a new trial." *Grace,* 397 Mass. at 305-306.

C. The civil verdict in Treefon's favor does not rise to the level of challenging the validity of the defendant's conviction.

The defendant asserts that a new trial should be granted because Christopher's "entire story depends on Treefon hiring Upton to kill Aris for money, but new evidence- the wrongful death verdict in Treefon's favor- proves Treefon did not hire Upton." (D.B.51)

The defendant claims that when the civil jury found Treefon "not culpable in Aris's death" it "undercut the Commonwealth's entire theory that this was a murder for hire at Treefon's behest." (D.B.52)

The motion judge explicitly rejected this claim in a footnote, nothing it did not warrant significant discussion. (CA.61) The judge correctly and succinctly stated, "[w]hat a separate civil jury may have concluded when presented with different evidence is of no relevance to the validity of the defendant's conviction." (CA.61) The verdict where Treefon was found not culpable in Aris's death does not rise to the level of challenging the validity of the defendant's conviction.

III. THE JUDGE WAS NOT REQUIRED TO HOLD AN EVIDENTIARY HEARING ON THE DEFENDANT'S MOTION FOR A NEW TRIAL, WHERE THE DEFENDANT DID NOT RAISE A SUBSTANTIAL ISSUE TO WARRANT A HEARING.

A. Standard of Review.

This Court reviews for an abuse of discretion, as it is within the judge's discretion to deny a motion for a new trial without a hearing if no substantial issue is raised. *Goodreau*, 442 Mass. at 248-349.

B. The motion judge properly denied the defendant's motion for a new trial, based on the factors discussed supra, and moreover, the judge properly denied the defendant's motion as the defendant did not raise a substantial issue.

The Commonwealth asserts that the defendant has not established a "substantial issue" in his motion for a new trial, therefore, an evidentiary hearing is not warranted. There is no requirement that the motion judge conduct an evidentiary hearing before deciding a motion for a new trial. "The choice of deciding the motion on the basis of affidavits or hearing oral testimony is left largely to the sound discretion of the judge." *Fogarty v. Commonwealth,* 406 Mass. 103, 110-111 (1989), *quoting Commonwealth v. Stewart,* 383 Mass. 253, 247 (1981). In deciding whether an evidentiary hearing is required, the motion judge must

consider whether the defendant's motion raises a "substantial issue," *Fogarty v. Commonwealth*, 406 Mass. at 111, which involves weighing the seriousness of the claims presented and the adequacy of the defendant's factual showing on those claims. *Stewart,* 383 Mass. at 257-258.

The decision whether to grant an evidentiary hearing on a motion for a new trial rests in the sound discretion of the judge. The judge may rule on the issues presented by the motion on the basis of the facts as alleged in the filings without a hearing if no substantial issue is raised by the motion or affidavits. *Commonwealth v. Licata*, 412 Mass. 654, 660 (1992).

In order to be entitled to a hearing, a defendant must raise a substantial issue and provide an adequate factual showing supporting his position. *See Commonwealth v. DeVincent*, 421 Mass. 64, 67 (1995). All the issues raised by the defendant can be decided by referring to the trial transcript.

A judge may also consider whether holding a hearing will add anything to the information that has been presented in the motion and affidavits." *Goodreau,* 442 Mass. at 348. The judge relied on his

"knowledge of the trial and evaluation of the witnesses and evidence at the trial when reaching [this] decision on [the defendant's] motion for a new trial, including whether to decide the motion without an evidentiary hearing . . .". (CA.60) *quoting Torres,* 469 Mass. at 403. The judge properly found that "the exhibits associated with the defendant's motion do not offer sufficient credible information to cast doubt as to whether there was a secret cooperation agreement between Christopher and the Commonwealth, and thus no evidentiary hearing is required." (CA.60)

The defendant claims that the prosecutor should have testified at an evidentiary hearing "to explain, at a minimum, the charge reduction and the sentencing recommendation." (D.B.53) "The district attorney is the people's advocate for a broad spectrum of societal interests- from ensuring that criminals are punished for wrongdoing to allocating limited resources to maximize public protection." *Commonwealth v. Gordon,* 410 Mass. 498, 500 (1991). In this case, the district attorney decided that, under its discretion, the public interest would be served by convicting the trigger man and mastermind, Robert Upton, of first degree murder, and a plea to manslaughter for

Christopher Manoloules. The prosecutor is not required to explain the charge reduction and sentencing recommendation at a hearing for Robert Upton, based on his entirely speculative claims that are only supported by testimony by Christopher at a separate hearing.

The defendant states that an evidentiary hearing should have been held because the judge erred when he found that "[Christopher] had a substantial motive to protect his family's financial interests by undermining the credibility of his own testimony." (D.B.54) Christopher had a significant motivation to lie- to ensure that the money at the center of this tragedy would go to his immediate family. It is that greed that led to the murder of Aris.

Where the defendant's motion does not raise a significant issue, and further, it can be decided completely on the papers, the defendant cannot succeed on this claim.

IV. THE INTERESTS OF JUSTICE DO NOT REQUIRE A NEW TRIAL, AND THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETION TO REDUCE THE VERDICT UNDER G.L. c. 278, §33E.

Under G.L. c. 278, §33E, this Court has the obligation to review the whole case to determine

whether there has been any miscarriage of justice in convicting the defendant of murder in the first degree. *Commonwealth v. Kilburn,* 426 Mass. 31, 38 (1997), *quoting Commonwealth v. Marquetty*, 416 Mass. 445, 452 (1993).

The defendant was hired by his brother-in-law, Treefon, to kill Aris Manoloules. Aris inherited their mother's estate, and this caused resentment and anger in the family. (6/879) The defendant was asked to mentor his nephew, Christopher, and help him to go to school and stop drinking. (7/1095)

The defendant and Christopher drove to Hyannis, and Christopher unsuccessfully searched for jewelry to steal while the defendant waited in the kitchen. (4/596). The defendant then pulled out a handgun and cocked the trigger. (4/598) The victim pleaded for his life, saying, "no, no, please." (4/598) The defendant then shot the victim four times, three from the front to his torso, and a shot directly to the back of his head. (3/426) The pair discarded their clothing, and drove back to Treefon's house. (4/604) This homicide was solely for the defendant's financial gain and profit, and to keep up his appearance of success.

From this evidence, this Court should decline to exercise its extraordinary power under G.L. c. 278, §33E as the defendant's conviction for first degree murder is the only verdict consonant with justice.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court deny the relief requested and affirm the defendant’s conviction.

Respectfully submitted,
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April 26, 2019

ADDENDUM

STATUTORY ADDENDUM

G.L. c. 265, § 1. Murder defined.
Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

G.L. c. 256, § 18(b). Armed Assault with Intent To Murder with a Firearm.
Whoever, being armed with a dangerous weapon, assaults another with intent to rob or murder shall be punished by imprisonment in the state prison for not more than twenty years. Whoever, being armed with a firearm, shotgun, rifle, machine gun or assault weapon assaults another with intent to rob or murder shall be punished by imprisonment in state prison for not less than five years and not more than 20 years.

G.L. c. 265, § 15A. Aggravated Assault and Battery with a Dangerous Weapon.
Whoever commits assault and battery upon a person sixty years or older by means of a dangerous weapon shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

G.L. c.265, §18A Armed Assault in a Dwelling.
Whoever, being armed with a dangerous weapon, enters a dwelling house and while therein assaults another with intent to commit a felony shall be punished by imprisonment in the state prison for life, or for a term of not less than ten years. No person imprisoned under this paragraph shall be eligible for parole in less than five years.

Whoever, being armed with a dangerous weapon defined as a firearm, shotgun, rifle or assault weapon, enters a dwelling house and while therein assaults another with intent to commit a felony shall be punished by imprisonment in the state prison for a term of not

less than ten years. Such person shall not be eligible for parole prior to the expiration of ten years.

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2009-00167

COMMONWEALTH

vs.

ROBERT UPTON

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

Robert Upton, the defendant, was convicted after a jury trial in January, 2013 of first degree murder, on the theories of deliberate premeditation and felony murder; aggravated assault and battery with a dangerous weapon; and armed assault in a dwelling. The Supreme Judicial Court stayed the direct appeal of the conviction pending the outcome of the defendant's two motions for new trial.[1] In the second motion now before the court, the defendant moves for a new trial on the grounds of newly discovered evidence arising out of the contradictory testimony of a key prosecution witness during a subsequent civil wrongful death action, and the purported existence of a secret agreement between that witness and the Commonwealth to reduce charges in exchange for testimony at the defendant's trial. The defendant also moves for an evidentiary hearing in support of his motion for new trial. After careful consideration of the record, exhibits, and memoranda, the defendant's motions for new trial and evidentiary hearing must be **DENIED** for the following reasons.

[1] This jurist denied the defendant's first motion for new trial on November 17, 2015. The instant motion followed, and is now before the court.

BACKGROUND

On September 30, 2009, Aris Manoloules was found dead in his Hyannis home, shot four times. The defendant, Robert Upton, was convicted of first degree murder after a jury trial in January, 2013, and sentenced to life in prison without parole.[2] The key prosecution witness at the defendant's trial was codefendant Christopher Manoloules.

As family relationships factored heavily in the events leading to Aris Manoloules' death, this jurist details them here. The defendant's sister is Christopher Manoloules' mother, Deborah Manoloules (née Upton), who is married to Christopher's father, Treefon Manoloules.[3] The victim, Aris, was Treefon's brother and Christopher's uncle. As such, the victim was related to the defendant only by extended marital ties: he was the defendant's sister's brother-in-law.

The following evidence was presented by the Commonwealth at the defendant's trial. Christopher testified that his father, Treefon, hired Christopher's maternal uncle, the defendant, to kill Christopher's paternal uncle, the victim. Christopher testified that Treefon had been trying to hire someone to kill the victim for some time because Treefon believed that the victim's neglect of their mother resulted in her death and the victim's sole inheritance of her estate. Christopher testified that his mother, Deborah, had recently asked the defendant, her brother, to mentor Christopher regarding school attendance and sobriety. Instead, according to Christopher's testimony, his interactions with the defendant quickly turned towards planning various lucrative criminal schemes, because the defendant claimed that he needed money to save the life of his daughter, Hailey, Christopher's cousin. Christopher testified that the defendant

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[2] The defendant was also convicted of assault and battery with a dangerous weapon with serious bodily injury, G. L. c. 265, § 15A(c)(i), and armed assault in a dwelling, G. L. c. 265, § 18A. The defendant was sentenced to 14-15 years in prison on the former and life in prison on the latter, to run concurrently with the first degree murder sentence.

[3] Because Christopher Manoloules, Deborah Manoloules, Treefon Manoloules, and Aris Manoloules share the same last name, this jurist refers to all four by their first names.

stated that he owed $150,000 to a man who was threatening to kill Hailey if he did not pay off the debt soon. Christopher testified that the defendant discussed his debt with Treefon, and Treefon suggested he would give the defendant the necessary money if he would kill the victim on Treefon's behalf. Christopher testified that Treefon promised to pay the defendant $165,000 over five days after the murder, and gave the defendant cash to purchase a handgun shortly before the murder.

This testimony was corroborated by the testimony of Christopher's friend, Dylan Laird.[4] Laird testified that he was present for conversations between the defendant and Christopher regarding a plan to rob a third party's house, and during conversations between Christopher, Treefon and the defendant regarding plans to murder the victim by overdose, shooting, or strangulation. Laird testified that he was asked by the trio to go along with the plan to murder the victim, but declined to participate.

The only testimony regarding the details of the shooting came from Christopher. He testified that, upon Treefon's direction, the defendant drove him to the victim's Hyannis home on the evening of September 29, 2009. Christopher testified that the defendant, carrying a handgun in his waist band and wearing unseasonably warm clothing and gloves, accompanied him into the victim's home. Christopher testified that the pair made pleasantries with the victim in the living room, and then Christopher went downstairs to search some bedrooms for jewelry while the defendant stayed upstairs in the kitchen. Christopher testified that after he returned to the kitchen and told the defendant there was no jewelry present and that they should just leave, the defendant pulled out his handgun, cocked the trigger, and walked into the adjacent living room.

[4] Laird testified pursuant to an expressly disclosed grant of immunity by the Commonwealth. The jury was instructed on the immunity and their ability to consider it when determining credibility or concluding whether the witness received any benefit, promise or reward for his testimony.

Christopher testified that he heard the victim say "No, no, please," and then four shots. Christopher testified that the defendant came out of the living room and stated "It's un[explitive] believable the amount of blood coming out of this guy's head." The pair left Hyannis and stopped at an unknown location to put their clothing and personal items into a dumpster before returning to Treefon's home.

The Commonwealth also presented the audiovisual recording of the defendant's October 1, 2009 interview with police. In the interview, the defendant first denied any knowledge of a crime or being on the Cape, but noted that he had bought a 9 mm Ruger handgun and 50 rounds of ammunition on the afternoon of September 29, 2009, and locked the items in the trunk of his car. As the interview progressed, the defendant stated that on September 30th, he noticed his gun missing and more miles than expected on his car and thought that Christopher or his friends might have driven his car. Eventually, the defendant admitted driving Christopher to a parking lot near the water on the Cape on the night of September 29th, and waiting while Christopher left for 20-30 minutes to "go meet someone." The defendant stated that Christopher returned in a tense state, and the defendant drove him back to Treefon's house. The defendant stated that he thought the gun was still locked in the trunk while the pair were on Cape, but he didn't check.

Along with Christopher's testimony and the defendant's interview statements, the Commonwealth presented evidence tying the defendant to the murder weapon. The Commonwealth presented evidence that the defendant had purchased a Ruger P85 handgun and a box of 9 mm ammunition between 3:30 and 3:50 p.m. on September 29, 2009. The defendant's girlfriend, Erin O'Malley, testified that she had seen him cleaning a handgun and ammunition in

her home on September 30, 2009, and told him to remove the weapon from her home.[5] O'Malley testified that on October 5, 2009, she and her sister searched O'Malley's basement, where the sister found a hidden handgun in a lock box and a box of ammunition missing four bullets. These items were submitted as evidence, along with testimony that the recovered handgun's serial number matched the one sold to the defendant, and ballistics testing matched it to shell casings and projectiles found at the scene.

Lastly, the Commonwealth presented evidence from which the jury could infer the defendant's awareness of and financial motive to participate in the murder-for-hire plot immediately preceding the victim's death. This evidence was offered in the form of testimony regarding a $77,000 Mercedes that the defendant purchased for O'Malley as a gift. A car salesman testified that when the Mercedes was delivered in late July, 2009, the defendant paid with a personal check, but told the salesman to hold the personal check because his funds were frozen and that a certified check or other payment would be forthcoming.[6] The salesman testified that the car was taken back from O'Malley after a period of time because extensive communications with the defendant regarding valid payment failed to produce any result. The salesman testified that he subsequently received a text message from the defendant's number at approximately 8 o'clock on September 29, 2009,[7] stating "My brother-in-law is getting the money for me, and I will know a lot more around 10:00 a.m. I didn't get back till 3:00 a.m. And Nerry (*sic*), I didn't reply. I will call you in a few hour (*sic*)."

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[5] By the time of her testimony, the witness had married and changed her name to Erin O'Malley Mandeville. At the time of the events in question, her name was Erin O'Malley. For the purposes of clarity, this jurist will refer to her as "O'Malley" throughout.

[6] The salesman was a former coworker of the defendant's, and had a friendly relationship with him at the time of the events in question.

[7] The evidence presented to the jury did not specify whether the text was received at 8:00 a.m. or 8:00 p.m.

DISCUSSION

"A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction." *Commonwealth* v. *Grace*, 397 Mass. 303, 305 (1986). Evidence is newly discovered if it was "unavailable at the time of trial and could not have been discovered with reasonable diligence." *Commonwealth* v. *LeFave*, 430 Mass. 169, 176 (1999). Newly discovered evidence casts real doubt on the justice of conviction if "there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial." *Grace*, 397 Mass. at 306. "Questions of credibility are for the trial judge, even when the testimony is undisputed." *Commonwealth* v. *Little*, 384 Mass. 262, 269 (1981) (citations omitted). A judge is not required to credit assertions in sworn testimony submitted in support of a motion for a new trial, and "may evaluate them in light of factors pertinent to credibility, including bias, self-interest, and delay." *Commonwealth* v. *Torres*, 469 Mass. 398, 403 (2014).

In considering the new trial motion, the court may base its decision entirely on the motion and accompanying exhibits, unless it determines that a substantial question was raised by the submissions which requires an evidentiary hearing. Mass. R. Crim. P. 30(c)(3); *Commonwealth v. Stewart*, 383 Mass. 253, 259-260 (1981). "In determining whether a substantial issue meriting an evidentiary hearing under rule 30 has been raised, we look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing on the issue raised." *Stewart*, 383 Mass. at 257-258 (internal quotations omitted). "A defendant's submissions in support of a motion for a new trial need not prove the factual premise of that motion, but they must contain sufficient credible information to cast doubt on the issue. A judge may also consider whether holding a hearing will add anything to the information that has been

presented in the motion and affidavits." *Commonwealth* v. *Goodreau*, 442 Mass. 341, 348 (2004).

This jurist relies on his "knowledge of the trial and evaluation of the witnesses and evidence at the trial when reaching [this] decision on [the defendant's] motion for a new trial, including whether to decide the motion without an evidentiary hearing." *Torres*, 469 Mass. at 403. The exhibits associated with the defendant's motion do not offer sufficient credible information to cast doubt as to whether there was a secret cooperation agreement between Christopher and the Commonwealth, and thus no evidentiary hearing is required. See *Goodreau*, 442 Mass. at 348. Accordingly, this jurist's decision is based solely on the record and exhibits.

I. Newness of the Proffered Evidence

A defendant seeking a new trial has the burden to show that the evidence was unknown to the defendant or trial counsel and not reasonably discoverable at the time of trial. *Commonwealth* v. *Shuman*, 445 Mass. 268, 271 (2005). The defendant's motion for new trial is largely based on Christopher's recent testimony in a civil trial. There, Christopher testified that he had no present memory of certain events to which he previously testified in the defendant's trial, and, for the first time, claimed his prior trial testimony was motivated by a secret, unwritten agreement he had with the Commonwealth to reduce his charges. Along with the civil testimony, the defendant's instant motion relies upon Christopher's agreed-upon guilty plea to a reduced charge of manslaughter several months after the defendant's trial and certain statements by counsel during Christopher's plea hearing.[8]

[8] The defendant raises two other claims without citation to any case law, which do not warrant significant discussion. First, the defendant claims that Christopher's plea of guilty to manslaughter is inconsistent with his trial testimony that he was trying to stop the victim's murder and had no intent to participate in a joint venture to rob or kill the victim. Even if the defendant's proposition is correct, this would merely constitute cumulative impeachment evidence, which is not ordinarily the basis of a new trial. *Grace*, 397 Mass. at 305-306. Second, the defendant claims that the civil jury's verdict, finding no liability for Treefon, "prove[s] that he had nothing to do with Aris' death" and "undercuts the Commonwealth's entire theory that this was a murder for hire at Treefon's behest" such

The outcome of the civil trial and plea hearing are certainly distinct events that occurred well after the defendant's trial, and thus were not discoverable through "reasonable pretrial diligence." *Commonwealth* v. *Pike*, 431 Mass. 212, 218 (2000). However, as discussed below, these pieces of evidence, without more, are insufficient to credibly allege that there was a secret cooperation agreement and cast real doubt on the defendant's conviction. As such, the defendant must also prove that Christopher's civil testimony was newly discovered to prevail on the motion.

Christopher testified at the trial, and was extensively cross-examined by trial counsel. He repeatedly denied that he had received any promises or held any belief that he would receive a benefit from the Commonwealth in exchange for his trial testimony.[9] Christopher's civil testimony to the contrary does not transform this later testimony into newly discovered evidence unless the defendant can make a substantial showing that the agreement did actually exist at the time of trial and was deliberately concealed from trial counsel by Christopher and/or the prosecutor. Cf. *Commonwealth* v. *Green*, 92 Mass. App. Ct. 1102, *2 (2017) (unpub.), rev. denied 478 Mass. 1104 (2017) (witness' subsequent testimony to events differing from trial testimony does not constitute newly discovered evidence where witness was specifically cross-examined at trial regarding subject on which witness was later inconsistent).

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that there is real doubt cast upon to the justice of the defendant's conviction. What a separate civil jury may have concluded, when presented with different evidence, is of no relevance to the validity of the defendant's conviction.

[9] Trial counsel specifically inquired "Nobody has suggested . . . you're going to get anything favorable for coming here and testifying?" to which Christopher responded "No, no – no promises, nothing." Trial counsel further inquired "Now, let me ask that in another way. We talked about the idea that nobody said anything to you. Has there been anything that wasn't said, but is understood in your mind?" to which Christopher replied "No." Trial counsel continued to press the issue, noting Christopher's pending charge for first degree homicide and asking "If you find yourself in this room three or four months down the road . . . getting tried for first degree homicide, are you going to be surprised?" Christopher replied that he did not know, that it was possible, but he did not "know what's going to happen." Trial counsel later emphasized this exchange during closing arguments, telling the jury that they were "being asked to swallow a legal fiction on the question of whether or not Christopher . . . is getting anything for testifying", and that it was up to them to decide if Christopher had "an expectation in his head of what he is getting for coming up here and saying the 'right thing.'"

As such, the defendant cannot prevail unless he provides substantial, credible evidence of his most serious claim: that a deliberate *Brady* violation has occurred. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); *Commonwealth* v. *Hill*, 432 Mass. 704, 715-716 (2000) (prosecutor violated *Brady* by failing to disclose "loose agreement" with witness to dismiss or reduce pending charges); *Commonwealth* v. *Gilday*, 382 Mass. 166, 176-177 (1980) (prosecutor who makes arrangement with witness's attorney for favorable treatment has duty to disclose same under *Brady*). Because the *Brady* determination constitutes the crux of the analysis as to whether Christopher's changed testimony casts any real doubt on the justice of the defendant's conviction, a single finding settling both questions is set forth below.

II. Credibility of Alleged Brady Violation

When viewed in the context of prior proceedings before this jurist, the defendant's evidence of a secret agreement lacks credibility and does not raise a real issue meriting an evidentiary hearing. The allegation of a secret agreement was raised and extensively explored on the record during pre-trial proceedings. The defendant filed a motion in limine for its production accompanied by the affidavit of an attorney unrelated to the case. The unrelated attorney attested that during Treefon's trial, which preceded the defendant's trial, she had overheard an assistant district attorney discussing Christopher's testimony with a third party and telling the third party that Christopher was going to receive a reduction in his charges to second degree murder.

In response to the motion, this jurist inquired of the prosecutor as to the existence of any secret agreement. The prosecutor specifically denied, while on record before the court, the existence of any undisclosed promise, reward or inducement. The prosecutor stated that the only agreement in place had been previously disclosed in Treefon's trial and to the defendant's counsel. The prosecutor stated that this disclosed agreement was explicitly limited to not using

Christopher's testimony and statements to the State Police against him in future proceedings, except in the instance of perjury. This jurist's inquiry on the subject was not cursory or general: the defendant's concerns regarding any communication of an inducement through implication or oral assurance of reduced charges, and the putative validity of the statement that Christopher was "getting second," were directly queried and denied by the prosecutor.[10] The prosecutor's specific, credible, and repeated denials satisfied this jurist that no secret agreement existed. The prosecutor's credibility is not diminished by Christopher's recent civil testimony asserting the contrary, and this jurist sees no reason to repeat what would be a nearly identical inquiry of the prosecutor in a separate evidentiary hearing on this motion.

Christopher's recent testimony occurred in the context of a civil wrongful death action brought by his aunt Irene Manoloules on behalf of the victim's estate.[11] The victim's estate, comprised largely of the disputed inheritance from his mother, was bequeathed to Irene and Treefon, in equal shares. In the civil action, Irene sought extensive damages on behalf of the victim from Christopher, Treefon, and the defendant. Thus, the outcome of the civil trial determined whether Christopher's father, and by extension his mother and sisters, would effectively lose his portion of the inheritance which is at the center of this sorry tale. In these circumstances, Christopher had a substantial motive to protect his family's financial interests by undermining the credibility of his own prior testimony that his father was the unrelenting force

[10] This jurist inquired if "anybody said to [Christopher], Kid, you are getting second for this?" The prosecutor replied "No, not by the Commonwealth. Not by me." This jurist further questioned the prosecutor as to "the fact that an ADA according to Attorney McLaughlin seems to know this kid is getting a second out of this case." The prosecutor stated that "it's not [true]. But even if it was, that would have to be communicated to Christopher . . . And he was under oath on two separate occasions and indicated that's not the case." For final clarification, this jurist asked "Has that ['he'll get a second'] been communicated to [Christopher] or his lawyers?" The prosecutor replied with an unequivocal "Never."

[11] *Irene Manoloules* v. *Treefon Manoloules et al.*, 1281 CV 3875.

behind the murder plot. Indeed, he explicitly admitted in his civil trial testimony that he wanted to help his father and thought he "deserved to win."

Christopher's credibility is diminished by more than just his motive to lie—the content and manner of his statements further undercuts any suggestion of their veracity. His testimony regarding the alleged agreement to avoid a life sentence was suspiciously vague. He offers no detail as to when such agreement was communicated to him or his attorneys, which person at the District Attorney's Office made the communication, or what form the communication took. Moreover, he provides no explanation as to why he would have concealed this agreement until the civil trial, while repeatedly testifying that there was no such agreement before the grand jury and at the trials of Treefon and the defendant.

The final blow to the credibility of Christopher's civil testimony comes from the telling silence that follows it. The defendant has not provided any evidence that Christopher has reiterated his claim of a secret agreement since the conclusion of the civil proceedings, nor has he provided affidavits from Christopher's attorneys confirming its existence and providing details of the relevant communications which would permit the court to ferret out such an agreement. "Given [a witness'] two sworn statements that no plea agreement existed, the absence of countervailing affidavits from those in a position to know the truth regarding the existence of an agreement supports a determination of a lack of credibility." *Commonwealth* v. *Raymond*, 450 Mass. 729, 734 (2008) (letter of cooperating codefendant witness claiming secret plea agreement not credible or sufficient material evidence in absence of affidavits from witness and attorneys to warrant evidentiary hearing or require allowance of motion for new trial). Cf. *Hill*, 432 Mass. at 710-711 (existence of undisclosed agreement for consideration bolstered by affidavit of witness's counsel detailing content of pretrial communications with prosecutor).

In short, this jurist concludes that Christopher's civil testimony regarding an informal agreement was a convenient falsehood, a transparent device fleetingly employed to protect his family's financial interests and cast aside once Treefon was secure from civil liability. The remaining evidence submitted by the defendant in support of the claimed *Brady* violation is weak and circumstantial: Christopher's subsequent guilty plea to manslaughter, and certain statements of counsel during the plea hearing.

Without more, the fact of the Commonwealth's subsequent disposition of a witness's pending charges through a change of plea with a favorable agreed-upon sentence does not raise a defendant's claim of an undisclosed cooperation agreement beyond mere "surmise." *Commonwealth* v. *Schand*, 420 Mass. 783, 792-793 (1995). See *Hill*, 432 Mass. at 708, 711-713.[12] The claim does not rise to firmer footing with the addition of counsel's statements during the plea hearing.

The defendant argues that the existence of the secret agreement is proven by the prosecutor's statement to the plea judge that "no discussions concerning a change of plea were ever *openly* discussed at all until after the completion of the trial of Robert Upton" (emphasis

[12] The defendant relies on *Hill* for the proposition that the Commonwealth's post-testimony reduction in charges for a witness is "strong[] support[for] the existence of an agreement." *Hill*, 432 Mass. at 712. In *Hill*, there was overwhelming evidence of the existence of an undisclosed cooperation agreement apart from the witness' reduced charges: the prosecutor testified at the witness' plea hearing that she told the witness "that the quid pro quo was 'if you cooperate we will take it into consideration'"; and the witness' counsel submitted an affidavit and testimony detailing specific conversations between himself and the prosecutor where she assured him the witness' charges would be dropped. *Id.* at 708, 711. Moreover, the *Hill* court's analysis with respect to the reduction in charges turns on facts which diverge from the case at bar. The *Hill* witness admitted to the elements of his pending charges during his testimony in the defendant's trial, and police had other, overwhelming evidence of his crime. *Id.* at 712. Here, Christopher did not admit to any of the elements of the pending first degree murder charge which he later avoided. Indeed, he extensively testified to his own lack of intent to kill the victim or steal anything from the home, as well as his attempt to dissuade the defendant from carrying out the murder shortly before it occurred and his prior acts to frustrate other attempts on the victim's life. Moreover, the Commonwealth could not use that testimony or his prior statements to police in a subsequent trial, by operation of the express agreement which was repeatedly disclosed by the trial prosecutor to defense counsel and this court. Without this, the Commonwealth had little more than circumstantial evidence and the defendant's statements to police that he drove Christopher to the victim's house and thought his gun might be missing. In short, despite the defendant's selective quotation of *Hill*, the broader analysis of that case sounds in supports the Commonwealth's position.

added). The term "openly" must be considered in the context of the prosecutor's immediately preceding statement that "there was never an offer made to Mr. Manoloules or his attorney during the pendency of either [Treefon's or the defendant's] cases." The juxtaposition of these two sentences demonstrates that the prosecutor's use of the term "openly" was not reference a secret agreement with Christopher or his counsel, but instead likely referred to any internal, confidential discussions amongst prosecution staff regarding an acceptable sentencing recommendation.

Next, the defendant argues that the statement of Christopher's plea counsel that the prosecutor was "a man of his word" refers to the prosecutor upholding his end of the alleged secret agreement. Again, plea counsel's comment cannot fairly be taken in isolation, and must be read in the context of his immediately preceding statements. The comment followed an extensive description of the prosecutor's "tak[ing] very seriously" several threats against Christopher and "instigat[ing]" "the transfer of [Christopher] to his present place of incarceration." Thus, it is likely that the "word" referenced by plea counsel was the prosecutor's statement that he would assist in securing Christopher's transfer to a safer facility. The defendant's interpretation defies reason, as it requires the conclusion that plea counsel was praising the prosecutor's honesty in sticking to a putative secret agreement just moments after hearing the prosecutor explicitly deny the existence of the agreement to the court.

Lastly, the defendant argues that plea counsel's later statement that Christopher "is getting some quid pro quo . . . for his cooperation with the Commonwealth" also references the existence of the alleged secret agreement. Once again, the context of the statement does not rationally support the defendant's interpretation. This phrase was uttered as part of a *request of the plea judge* to provide consideration by sentencing lower than the Commonwealth's

recommendation: "I ask for some consideration, more than what the State as (*sic*) enumerated for you, to show that he's—he's getting some quid pro quo . . ." No such judicial consideration would be required if, as the defendant suggests, the Commonwealth was bound by and adhered to a secret cooperation agreement.

Accordingly, this jurist finds that none of the evidence put forth by the defendant, whether newly discovered or previously available, credibly supports the defendant's claim that the prosecutor deliberately violated his duty under *Brady* by concealing a secret agreement to reduce Christopher's charges in exchange for his testimony, and failed to correct false trial testimony on that subject by Christopher.

III. Materiality of Impeachment Evidence

Although the defendant has failed to meet his burden as to newly discovered evidence of a secret cooperation agreement, Christopher's testimony in the civil trial still stands as impeachment evidence undermining the credibility of his testimony at the defendant's trial. Recantation of testimony by a witness "warrants 'serious consideration from the motion judge.'" *Commonwealth* v. *Jones*, 432 Mass. 623, 632 (2000), quoting *Commonwealth* v. *Watson*, 377 Mass. 814, 837-838 (1991). "While newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial, a new trial may be warranted where . . . the Commonwealth's case depends on the testimony of a single witness and the newly discovered evidence contradicts that testimony." *Commonwealth* v. *Drayton*, 479 Mass. 479, 490 (2018) (internal citations and quotations omitted). This is not the case here.

First, the Commonwealth's case did not wholly depend on Christopher's testimony. Excluding Christopher's testimony completely, the Commonwealth still presented Laird's testimony that the defendant discussed a plot to kill the victim with Treefon and the defendant,

the defendant's statement to police admitting he drove to the location of the murder with Christopher, the forensic matching of the murder weapon to the handgun purchased by the defendant only hours before, O'Malley's testimony regarding the defendant's possession and concealment of the murder weapon after the victim's death, and the defendant's text message shortly before the murder to the car salesman stating that he was getting at least $77,000 "from [his] brother-in-law" and would know more "at 10:00 a.m." In this jurist's estimation, this web of evidence was strongly persuasive to the jury.

Second, Christopher's civil testimony did not contradict his trial testimony on the subject of the defendant's involvement. To the contrary, Christopher's civil testimony specifically affirmed the defendant as the shooter, and did not claim any gaps in present memory as to the defendant's actions.[13] Further, although Christopher repeatedly volunteered that he had no present memory of conversations with or actions by Treefon to which he had previously testified, he deftly and consistently refused to disavow any portion of his prior testimony at the trials of Treefon or the defendant, except on the subject of an alleged secret cooperation agreement.[14] Thus, the only recantation in Christopher's testimony was on the subject of his motive to testify: he recanted his claim that he was trying to "do the right thing", and admitted he was trying "to avoid a life sentence."

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[13] During civil cross-examination, Treefon's counsel asked "So it was either you that pulled the trigger, or it was Robert Upton that pulled the trigger, correct?" Christopher responded "It was Robert Upton."

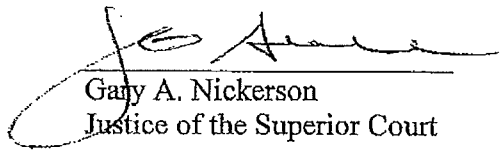
[14] Treefon's counsel asked "You acknowledge that that was your testimony, correct?" Christopher stated "Yes. Yes." Counsel asked "But you do not acknowledge that that is the truth, do you?" Christopher responded "I'm not going to admit to perjury, but that's – is that what you're asking me to? Because no, that was the truth." Counsel asked "Are you saying that that was the truth back then?" Christopher answered "Yes." Counsel asked "Are you saying that your father was implicate – was involved in this murder?" Christopher responded "That's what it says." Counsel pressed "I understand what that says, but are you saying that to this jury right now?" and Christopher responded "Yes." Counsel parried "You are saying that?" and Christopher returned "That's what it says." Counsel tried once more, stating "Okay. So you're not moving from this?" and Christopher responded "No." Counsel clarified "Okay. But you don't remember some of your testimony, do you?" and Christopher agreed "I have a bad memory."

In this jurist's view, Christopher's demeanor at the defendant's trial, and his testimony casting himself as repeatedly trying to save his uncle and "do the right thing," had already raised significant questions in the jury's mind as to his motive to testify. The centerpiece of the defense theory was that Christopher was pinning the crime on the defendant to serve his own self-interest, and trial counsel repeatedly and effectively challenged Christopher's assertions that he was only an unwilling victim of his father and uncle's manipulation. This jurist also instructed the jury to weigh the motive of a witness to testify and to consider whether "a witness has or hasn't been promised anything, or whether that witness in the witness' mind expects some reward or something in return for their testimony." Thus, the addition of the civil testimony would be merely cumulative of ample impeachment evidence, and would not add much to the jury's consideration of his testimony in light of the other independent evidence of the defendant's guilt. *Commonwealth* v. *Toney*, 385 Mass. 575, 581 (1982).

In sum, this jurist concludes that the defendant has not provided sufficient, credible and material evidence to cast any real doubt on the justice of his conviction, or require an evidentiary hearing to further explore his claims. *Commonwealth* v. *LaFaille*, 430 Mass. 44, 55 (1999). Accordingly, the defendant's motion for new trial must be **DENIED**.

ORDER

For the foregoing reasons, it is **ORDERED** that the defendant's Motion for New Trial be **DENIED** without hearing.



Gary A. Nickerson
Justice of the Superior Court

DATED: July 27 2018

1/7/13

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss: SUPERIOR COURT
No. 2009-167

Jan. 8, 2013 - After hearing, the Commonwealth represents no promises, inducements, or rewards have been made, by the Court, Nickerson, J.

COMMONWEALTH

v.

ROBERT UPTON

J. G
Asst Clerk

DEFENDANT'S MOTION IN LIMINE FOR HEARING REGARDING EXCULPATORY EVIDENCE INCLUDING BUT NOT LIMITED PROMISES, REWARDS AND INDUCEMENTS TO WITNESSES

Defendant moves for an order requiring the Commonwealth to provide him with all exculpatory evidence hereto, including but not limited to rewards, promises and inducements offered or provided to witnesses.

It is anticipated that the Commonwealth's percipient witness who will testify against this defendant is the co-defendant Christopher Manoloules. Christopher Manoloules has already testified against his father Trefon Manoloules in an earlier trial related hereto.

The Commonwealth has provided no information regarding any promises, rewards or inducements other than to insist that here are none.

However, Defendant has received independent information regarding potential promises and rewards, as detailed in the affidavit of Attorney Ruth McLaughlin, Esq. attached hereto as Exhibit A. Attached as Exhibit B is correspondence regarding this issue from defense counsel to the prosecutor.

Defendant, by counsel

Daniel Solomon, Esq.
11 Beacon Street, Suite 315
Boston, MA 02108
617 367 5800
BBO 472580

AFFIDAVIT

I, Ruth McLaughlin, hereby attest as follows:

1) I am member of the Massachusetts Bar and have been licensed to practice within the Commonwealth since 1992.

2) At all times relevant hereto I have been the Attorney in Charge at the Barnstable Office of the Committee for Public Counsel Services.

3) During the pendency of a murder trial in Barnstable Superior Court in during the fall of 2011, Comm. v. Treefon Manouloules, I have a specific memory of being at the Barnstable Superior Court, during which time I overheard a conversation between ADA Nicole Manoog Esq. of the Barnstable District Attorney's Office and an unidentified male attorney.

4) This conversation took place within the bar of the second session of the Barnstable Superior Court while the Court was not in session. I was no more than 12 feet away and could hear perfectly.

5) The male attorney asked ADA Manoog what was going on in the session. ADA told him that is was a murder trial, and that a son was testifying against a father.

6) The male attorney asked "what is he getting", and ADA Manoog replied that he was getting a 'second'.

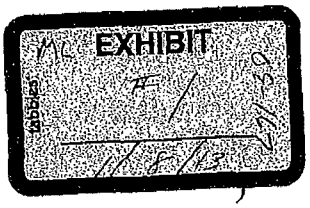
Sworn to under the penalties of perjury this 10th day of October 2012.

Ruth A. McLaughlin

1/8/13

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss



Superior Court Department
Crim No. 1072CR00126 (1-4);

Commonwealth)
)
vs.) *Commonwealth's Answers to Defendant's Motion for Discovery*
)
Treefon MANOLOULES)

Now comes the Commonwealth, by and through its District Attorney, Michael D. O'Keefe, and offers this Honorable Court the following further answers to the Defendant's request for Discovery:

I. DEFENDANT'S FIRST MOTION FOR DISCOVERY

1. Defendant's Motion For Promises ,Rewards, Inducements

1A. The Commonwealth states that no promises, rewards or inducements have been made to any potential witnesses in this case. Christopher Manoloules, a co-defendant did give two recorded statements to the Massachusetts State Police Detective Unit assigned to the Cape & Islands District Attorney's Office and also testified at the Barnstable County Grand Jury. Christopher Manoloules was represented by Attorneys and reached out to the Commonwealth. He was told that his statement(s) would not be used against him at any proceeding where he was the defendant on trial. The Commonwealth has been informed that various witnesses have indicated they would be inclined to avail themselves of their 5th Amendment right against self-incrimination. Should the Court find that these witnesses do have a valid 5th Amendment right, the Commonwealth may seek to immunized those witnesses.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

MICHAEL O'KEEFE
DISTRICT ATTORNEY
CAPE & ISLANDS DISTRICT

By Brian S. Glenny

Brian S. Glenny
First Assistant District Attorney
Cape & Islands District Attorney's Office
PO Box 455
Barnstable, MA 02630
BBO # 546143

September 19, 2011
8 January 2013

MR. GLENNY: I would object, your Honor. I think -- if he asks one question, I think I'll withdraw the question.

Q Do you know whether this was Father's Day of 2010?

A I think it was -- yeah, that was when -- that's -- I was still covering for him.

Q So, you think it was Father's Day of 2010?

A That was closer to Father's Day, yeah.

MR. GLENNY: No objection, your Honor.

THE COURT: Next number exhibit.

THE CLERK: Eighty-four.

(Card marked as Exhibit No. 84.)

Q Now, you met with the police in June of 2010 for the first time, correct?

A I think.

Q And do you have a recollection of -- you were still being held at that time, I take it, correct?

A Yes.

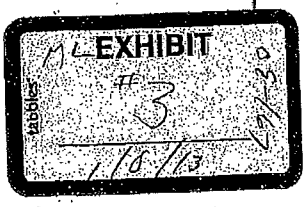
Q And do you have a recollection of Mr. Glenny asking you on -- I believe it was Monday of this week -- whether or not anything had been promised to you in exchange for your testimony here?

A Yes.

Q And you correctly answered nothing had been promised to you, correct?

A Nothing has been promised.

A First he gave it to Bob, but then Bob gave it to me. And I kept it at the house.



Q So, Riz's friend gave that rifle to Bob Upton?

A Yep.

Q And then Bob gave it to you?

A Yeah.

Q Okay.

A It was in Bob's car at first.

Q And you told us yesterday about that other plot involving the rifle that never came to be done, right?

A Yes.

Q Now, you have spoken with the police in this case; is that right?

A Yeah.

Q You told them where you put the rifle, correct?

A Yep.

Q Now, Christopher, have any promises been made to you for your testimony here today?

A No.

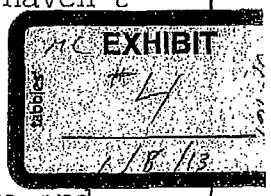
MR. GLENNY: Thank you. That's all I have, your Honor.

THE COURT: Cross-Examination, if you wish.

MR. WILCOX: Your Honor, may I inquire?

THE COURT: Please.

Dylan and Rizz, you've not talked to any of your friends about the situation? And the situation, I mean is about the fact that you're here now and your father pretty much had asked for you to do what you did. That's what I'm talking about. You haven't -- because you've been ---



A Just trying not to have that happen, but ---

Q And no one's promised you anything to come in here and testify today, have they?

A No.

Q In fact, you have the understanding that the statement that you're making here today, and the statement you made to the State Police a few weeks ago would not be used against you in any proceeding unless you were to testify and then say something different, and then it could be used to show that there were two different versions, right? That's your understanding of this?

A Yeah. Yes. Said that ---

Q That it won't be used against you. But no one's promised you about what's going to happen to your case, have they?

A No.

MR. GLENNY: Does anybody have any questions for the witness? GJ 8/20/2012 (7-19)

nse)

MR. G all set. Thank you.

gs concluded

Q And I'm not suggesting anything has been promised, but did you have an expectation --
A Yeah.
Q Did you have an expectation that by cooperating with the authorities that you would receive some consideration for this? You would receive something back for that?
A I don't know. It's not up to me.
Q Do you have a hope that that happens?
A I mean, hopefully something will happen, but -- I don't know. That's not my choice.
Q Right. But you have cooperated with the idea that something was going to be done for you at some point in time?
A I didn't know that.
Q You didn't know that?
A It's a possibility hopefully, but who knows.
Q But you hope that that's what happens?
A Yeah. It's not up to me.
Q After you gave that statement -- I mean, while you were giving that statement, were you asked questions about Mr. Robert Riz Brown and Dylan Laird? About whether they would speak to the police?
A I don't remember. Maybe -- probably. That would make sense, if they asked.
Q Do you remember saying during that statement, "I mean, the only way honestly you guys would probably even have a chance to

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS. SUPERIOR COURT
Case No. BACR2009-158

****

COMMONWEALTH OF MASSACHUSETTS

vs.

CHRISTOPHER MANOLOULES,
Defendant.

****

CHANGE OF PLEA/DISPOSITION

BEFORE THE HONORABLE ROBERT C. RUFO,
ASSOCIATE JUSTICE OF THE SUPERIOR COURT

May 29, 2013
Barnstable, Massachusetts

Main Session

APPEARANCES

FOR THE COMMONWEALTH: BRIAN S. GLENNY, ESQ.
Assistant District Attorney
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Barnstable, MA 02630
508-362-8113

FOR THE DEFENDANT: GERALD ALCH, ESQ.
Lewis & Leeper
411 Union Avenue
Framingham, MA 01702
508-370-3400

Barnstable, Massachusetts

May 29, 2013

(REPORTER'S NOTE: If this transcript contains quoted material, such material is reproduced as read or quoted by the speaker. "Uh-huh" or (Nods.) denotes an affirmative response; "Unh-unh" or (Shakes head.) denotes a negative response. "[Ph]" denotes a phonetic spelling, and "[sic]" denotes "as read or spoken by the speaker.")

(REPORTER'S NOTE: Pursuant to 201 CMR 17.00, personal information is required to be redacted. The full testimony is retained in the reporter's original notes. Personal information to be redacted is dependent upon the specific circumstances, which includes name, social security or license number, account numbers, et cetera, pursuant to the CMR.)

* * * P R O C E E D I N G S * * *

(2:50 p.m.)

(Defendant present.)

THE CLERK: This is Commonwealth versus Christopher Manoloules. The defendant is in the dock.

I believe this is a change of plea.

Are we going forward with the indictments as drawn?

ATTY. GLENNY: No, your Honor.

As to the first indictment, the Commonwealth would be nolle prosing as much that alleges anything more than

manslaughter. The other three will remain as they are drafted.

THE COURT: Advice and consent of defendant?

ATTY. ALCH: Yes, your Honor.

THE COURT: All right.

THE CLERK: Christopher Manoloules, on Indictment 158-01, as amended to charging you with manslaughter, do you wish to change your plea from not guilty to guilty?

THE DEFENDANT: Yes.

THE CLERK: Indictment 158-02, charging you with armed assault with intent to murder or rob, do you wish to change your plea from not guilty to guilty?

THE DEFENDANT: Yes.

THE CLERK: 158-03, charging you with aggravated assault and battery by a dangerous weapon, sir, do you wish to change your plea from not guilty to guilty?

THE DEFENDANT: Yes.

THE CLERK: And on 158-04, charging you with armed assault in a dwelling house, sir, do you wish to change your plea from not guilty to guilty?

THE DEFENDANT: Yes.

THE CLERK: Please come over here to the witness stand.

Sir, raise your right hand as best you can.

(DEFENDANT SWORN.)

THE DEFENDANT: Yes.

CHRISTOPHER MANOLOULES, sworn:

EXAMINATION

BY THE COURT:

Q Good afternoon, Mr. Manoloules.

A Good afternoon.

Q My name is Robert Rufo. I'm a judge here in the Superior Court in Barnstable County. It's now my obligation to ask you a series of questions to ensure that you are giving up the rights that you're giving up today by pleading guilty rather than exercising your right to a trial before a judge or a jury; that you're doing so freely, voluntarily, knowingly, and intelligently, not because someone's forcing you or pressuring you to do so.

If at any time during my questioning of you you wish to speak with your attorney, Attorney Alch, just tell me to stop, I'll allow you to speak with him in private, we'll go on from there.

Do you understand, sir?

A Yes.

Q I need you to keep your voice up nice and loud because we're not only recording this but we have a court reporter that's taking a transcript of this discussion.

Do you understand?

A Yes.

Q State your name.

A Christopher Manoloules.

Q How old are you, sir?

A Twenty-one.

Q How far have you gone in school?

A Just got my GED.

Q You can read and write in English?

A Yes.

Q Do you speak any other language?

A No.

Q What was your occupation prior to incarceration?

A I was in high school.

Q Did you ever hold a job?

A Did landscaping before.

Q Okay. Could you keep your voice up because I'm having trouble hearing you.

A Yeah. I did some landscaping before.

Q Under the influence of illegal drugs or alcohol today?

A No.

Q Taking any prescription medication as prescribed by the healthcare professionals at the correctional institution?

A No.

Q Being treated for any ailment whatsoever?

A No.

Q Ever suffer from a mental, psychological, or emotional condition?

A No.

Q Ever visited a psychologist or a psychiatrist?

A No.

Q Understand today you're offering to change your plea to the reduced charge that has been made by a motion by the Commonwealth to manslaughter, armed assault with intent to murder or rob, aggravated assault and battery by means of a dangerous weapon, and armed assault in a dwelling or a house. Am I correct on that?

ATTY. ALCH: Yes.

A Yes.

THE COURT: Consult with your attorney.

(Defendant and counsel confer.)

A Yes.

BY THE COURT:

Q So I understand you wish to change your plea from not guilty to guilty to manslaughter; right?

A Yes.

Q Armed assault with intent to murder or rob?

A Yes.

Q Aggravated assault and battery by means of a dangerous weapon?

A Yes.

Q And armed assault in a dwelling or house?

A Yes.

Q Is anybody forcing you to do that today?

A No.

Q Now, I also understand that there's been a discussion between the Commonwealth and your attorney with respect to recommendation of a sentence, and what I'm going to do is ask you several questions in connection with your decision to change your plea. If at the conclusion of my discussion of you you don't wish to accept the Court's recommendation, I'll allow you to withdraw the plea and then the matter's going to be scheduled for trial before a judge or a jury.

Do you understand that?

A Yes.

Q Okay. So at this particular point in time, I'm going to call upon the Commonwealth's prosecutor, ADA Glenny, who's going to recite the facts that he believes the Commonwealth could prove beyond a reasonable doubt with respect to those offenses that I've just outlined for you.

After that, I'll have some further questions for you, sir. Do you understand?

A Yes.

THE COURT: ADA Glenny.

ATTY. GLENNY: Thank you, your Honor.

On or about September 29th of 2009, a plan including Mr. Manoloules here, Christopher, and Robert Upton and another, was hatched in which they'd come down to the Cape and attempt to steal from Christopher Manoloules's uncle money and/or jewelry or any other things of value that might be able to be found.

Robert Upton, who would be the maternal uncle of Mr. Christopher Manoloules, was also part of that plan. He came down -- actually drove down to the Cape, being armed at that time; known to Mr. Christopher Manoloules that he was, in fact, armed.

Once arriving here at the Cape, they did go to the home or the Cape Cod home of Aris Manoloules, who would be the paternal uncle of Christopher Manoloules and the target of this crime, and entered into that dwelling house. At that time, Christopher Manoloules knew that Robert Upton was armed.

While in the house, Christopher Manoloules then attempted to see if he could find anything of value and which to steal. That did not prove to be fruitful. There had been a discussion in the kitchen area and he related that information to Robert Upton, who then took the firearm from his person, walked into the living room and shot and killed Aris Manoloules.

After that, they left the residence and fled.

Those would be the essential facts for these charges,

your Honor.

BY THE COURT:

Q Mr. Manoloules, did you hear the Commonwealth's prosecutor, ADA Glenny, recite the facts to me that he believes he could prove beyond a reasonable doubt if this case were to go to trial?

A Yes.

Q Do those facts fairly and accurately describe your conduct in this particular case, sir?

A Yes.

Q Is there anything that was just described to me that you don't believe to be fair or accurate?

A No.

Q Do you understand by pleading guilty that you're admitting to the truth that would -- of the facts that were just stated to me?

A Yes.

Q You understand that -- you're pleading guilty because you are guilty and for no other reason?

A Yes.

Q Is that what you wish to do today, sir?

A Yes.

Q Has anybody forced you to do that?

A No.

Q Have you had sufficient time to discuss all your options

with your attorney, Attorney Gerald Alch?

A Yes.

Q Do you have any questions for him at this particular point in time?

A No.

Q Sir, you should understand today you're giving up your right to a trial before a judge or a jury.

This matter could be tried in front of a jury. A jury is comprised of 12 persons randomly selected from the community at large. You and your attorney, Attorney Alch, would have the right and the privilege to participate in the selection process of who would sit on the jury.

During the course of jury selection or jury impanelment, you, through your attorney, would be able to challenge any juror for a stated reason, for cause. You would also have the right to challenge a number of jurors for no stated reason at all. We call that a peremptory challenge.

Once the jury was impaneled and convened, they alone would decide your guilt or innocence. They would do so with the Commonwealth at all times bearing the full burden of proof that we call in court beyond a reasonable doubt.

The burden of proof never shifts. You are presumed innocent under our laws.

During the course of the trial, the jury would be instructed by the Court on the law. The judge would instruct

the jury at the end of the trial on what the law is. The jury alone would decide -- have to decide unanimously, a jury of 12, as to whether or not you were guilty or not guilty of some or all of the charges for which you stand accused.

Do you understand today you're giving up your right to a trial by jury as I very briefly outlined it for you?

A Yes.

Q Additionally, you're giving up your right to a trial by a judge. You could waive the jury, have a judge. He or she would listen to the same evidence produced by the Commonwealth, understanding the same bedrock constitutional principles:

That you retain the presumption of innocence; that the Commonwealth has to prove the essential elements of these offenses against you by that standard of proof "beyond a reasonable doubt." The judge would then determine the facts as he or she found them to be, apply those facts to the law as the judge understands the law to be, and decide whether you were guilty or not guilty of some or all of the offenses for which you stand accused.

Do you understand you're giving up your right to a trial by a judge, a so-called "jury-waived" or "bench trial," today, sir?

A Yes.

Q Has anybody forced you to do that?

A No.

THE COURT: I'm having trouble hearing your client, Attorney Alch.

ATTY. ALCH: Please talk louder.

A No.

BY THE COURT:

Q Sir, do you understand that as to whether or not you decide to have a trial before a judge or a jury that you're giving up your so-called "right of confrontation" guaranteed to you under the Sixth Amendment of the Constitution of the United States. You have the right to confront the government's witnesses who would be called to testify against you. You, through your attorney, would have the right to cross-examine these witnesses in an attempt to impeach their credibility.

Do you understand you're giving up your right of confrontation today, sir, through cross-examination, your right to confront the government's witnesses who will be called to testify against you?

A Yes.

Q Anybody forced you to do that?

A No.

Q Also, sir, you would have the right -- although you're not obliged to -- to call witnesses and produce evidence in your own defense. You're giving that up today by pleading

guilty. Do you understand?

A Yes.

Q Has anybody forced you to do that?

A No.

Q You do so freely and voluntarily?

A Yes.

Q Also, in connection with your decision to give up your right to a trial before a judge or a jury, you're giving up your privilege against self-incrimination. This is your right to remain silent. No one can force you or place you in a position to infer your guilt. You have the right to remain silent. The fact that you chose to remain silent during the course of your jury trial, at your request the judge would instruct the jury that they could not infer any adverse inference from the fact that you chose to retain your Fifth Amendment privilege against self-incrimination, your so-called "right to remain silent."

Do you understand you're giving that up today by pleading guilty to these charges?

A Yes.

Q Is that what you wish to do today, sir?

A Yes.

Q Anybody force you to do that?

A No.

Q Sir, you're also giving up your right to file any motions

to dismiss some or all of the indictments, motions to suppress evidence that may have been collected at the time of the offense. You're giving up your right to have those motions heard; appeal a denial of the motions, if the motions were denied; or giving up your opportunity to have a motion allowed by the Court.

Do you understand that you're giving up your right to file or to have heard motions to dismiss, motions to suppress evidence?

A Yes.

Q Have you discussed that with Attorney Alch?

A Ah. Yeah. Yes.

THE COURT: Were there any such motions filed in this case, Attorney Alch?

ATTY. ALCH: No, your Honor.

THE COURT: Okay.

BY THE COURT:

Q Sir, Mr. Manoloules, it's my obligation to inform you that if you're not a citizen of the United States, you must assume that the acceptance by this Court of your change of plea from not guilty to guilty to these charges will have the consequences of deportation, exclusion from the United States, or denial of your naturalization of citizenship.

Do you understand?

A Yes.

Q Has that in any way affected your decision to change your plea from not guilty to guilty?

A No.

Q Sir, you'll also be required within one year to submit a sample of your DNA for inclusion in the so-called "DNA state database," for the state police to include your DNA in the state police DNA database, and there's a fee in connection with that as well.

Do you understand you will be required to do that as a result of your change of plea from not guilty to guilty?

A Yes.

Q Has that in any way affected your decision to change your plea today from not guilty to guilty?

A No.

Q You've had the advice and counsel of Attorney Alch.

A Yes.

Q Pleased and satisfied with his legal representation of you, his recommendations to you today with respect to disposition in this particular case?

A Well -- what? I didn't hear that last part.

Q Sure. You've had legal representation from Attorney Gerald Alch, the gentleman who's standing beside you?

A Yeah. It was the last part I didn't -- yes.

Q Let me take you through the questions; all right?

You're familiar with Attorney Alch?

A Yes.
Q You've had a chance to speak with him?
A Yes.
Q Pleased and satisfied with his legal representation of you? His advice, his recommendations to you today concerning the ultimate disposition on this matter?
A Yes.
Q Do you have any questions for Attorney Alch at this time?
A No.
Q Has anybody threatened you or pressured you to change your plea from not guilty to guilty?
A No.
Q Are you confused by any of the questions I've asked you so far?
A No.
Q Do you understand all the questions I've asked so far?
A Yes.

THE COURT: Attorney Alch, do you know of any reason why I should not accept Mr. Manoloules's change of plea from not guilty to guilty?

ATTY. ALCH: No, your Honor.

THE COURT: ADA Glenny, do you know of any reason why I should not accept Mr. Manoloules's change of plea from not guilty to guilty?

ATTY. GLENNY: I do not.

THE COURT: All right.

BY THE COURT:

Q Mr. Manoloules, I'm going to show you this form. Ask you if you recognize this document?

A Yes.

Q Did you have a chance to read it?

A Yes.

Q Did you go over it with Attorney Alch?

A No.

Q No?

A We didn't go over it.

Q All right. Take a moment. Sit right there in the front row with Attorney Alch. I want you to read it with him.

THE COURT: Attorney Alch, would you sit with your client and go over the waiver of rights form.

ATTY. ALCH: I will, your Honor.

THE COURT: Thank you.

Scott.

(Clerk and Court confer.)

(Defense counsel and defendant confer.)

BY THE COURT:

Q Sir, do you recognize this document?

A Yes.

Q Did you have a chance to read it with Attorney Alch?

A Yes.

Q You should understand that this form sets forth in writing the rights and other matters that I just explained to you in greater detail.

A Yes.

Q Did you read it in English?

A Yes.

Q Do you have any questions about that document?

A No.

Q You should understand that your signature indicates that you're aware of the rights that I've explained to you in greater detail, that you understand them, and that you're giving them up today; that is, your right to a trial by jury, right to trial by judge, and the other matters that I've discussed with you in greater detail. They're all contained on that form.

Did you recognize that?

A Yes.

Q Did you sign the document?

A Yes.

Q Is that your signature, sir?

A Yes.

Q What's the date of your signature?

A May 29.

Q Did anyone force you to do so?

A No.

Q You do so freely and voluntarily?

A Yes.

Q All right.

THE COURT: I'm going to accept the change of plea. Find that there is a factual basis for the change of plea from not guilty to guilty for the offenses known as manslaughter, armed assault with intent to murder or rob, aggravated assault and battery by means of a dangerous weapon, and the armed assault in a dwelling or a house.

I find that the defendant, Mr. Christopher Manoloules, is not under the influence of illegal drugs or alcohol, suffering from a mental condition or illness that would prevent him from freely, voluntarily, knowingly, and intelligently waiving the rights that I've gone over with him in greater detail. I find that he understands the consequence of his change of plea. The plea was offered knowing, willingly, intelligently, voluntarily.

The clerk is directed to accept the change of plea.

THE CLERK: Thank you, Judge.

Christopher Manoloules, on Indictment 158-01, as amended to charging you with manslaughter, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: 158-02, charging you with armed assault with intent to murder or rob, sir, how do you plead, guilty or

not guilty?

THE DEFENDANT: Guilty.

THE CLERK: 158-03, charging you with aggravated assault and battery with a dangerous weapon, sir, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: And on Indictment 158-04, charging you with armed assault in a dwelling house, sir, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Commonwealth move for sentencing?

ATTY. GLENNY: Yes, your Honor.

I would just like a moment to address -- there are attorneys here for one of the brothers of the victim, see if they want to be heard.

(Pause.)

ATTY. GLENNY: They don't wish to address the Court, your Honor.

THE COURT: Are there victim impact statements that I should see?

ATTY. GLENNY: No. No.

Your Honor, just with respect to the factual basis of the case, I know that you were the judge that actually heard the motion to suppress in the Robert Upton case and so you kind of have more of a feeling for what the case was all about and how

Christopher Manoloules's role in the case.

Beyond the facts that I just gave, the Commonwealth's position has always been that he was used in this situation; you know, not completely unknowingly, but certainly not to the extent that I think he thought this was all going to play out in the end.

He, at the very early stage after this case became known to the police, offered to cooperate with the authorities in the matter and he, in fact, testified in two of the trials that took place in this Barnstable Superior Court, your Honor.

And, for the record, there was never an offer made to Mr. Manoloules or his attorney during the pendency of either of those two cases. In fact, no discussions concerning a change of plea were ever openly discussed at all until after the completion of the trial of Robert Upton, which was the second in time of the trials.

With that being said, your Honor, the Commonwealth, in light of the fact that he did cooperate and he did, in fact, testify in those two cases, agreed to reduce this to a manslaughter, and we're recommending on that charge a 12-to-15-year MCI-Cedar Junction commitment.

On the assault to rob or murder, the armed assault to rob or murder, we're recommending a five to five and a day, concurrent. And I believe there's a five-year mandatory, and that's why I'm saying five to five and a day.

And then with respect to the aggravated assault and battery by means of a dangerous weapon, also a five to five and a day, concurrent.

And then with the assault in a dwelling, armed assault in a dwelling, a 10 to 10 and a day, and that's because there's a 10-year mandatory; but that, again, concurrent, your Honor, with the 12 to 15 that we're recommending.

THE COURT: All right.

Attorney Alch.

ATTY. ALCH: Yes, your Honor.

Your Honor, one of the key words uttered by Mr. Glenny was that my client was "used," and I heartily endorse that description. He was used. He was a young man at the time these offenses were committed.

I vividly remember the first time I saw him, and he certainly doesn't look today the way he looked then. He was in his own personal hell. It took me a while -- a long while to gain his confidence so that he would relate to me the facts as he knew them.

Once he did, we discussed his options, and he expressed to me the desire to do the right thing. And that led to his being debriefed by Mr. Glenny and the state police. After he was debriefed, they checked his story for veracity. It passed that test. He went before a grand jury. An indictment was returned as a result of his testimony.

And these were very, very uncomfortable circumstances for this young man, because one of -- the indictment that was brought down as a result of his testimony was against his own father, who is in the courtroom today with his mother, who testified for his father in his father's trial.

And I can't appreciate the difficulty that he must have experienced, again, being in the middle of things, and he understood and realized the perplexities involved and the emotional tugs of war inside of him that were in play when he testified against his father; and then to a lesser degree, but just as significantly, against his mother's brother, his uncle.

So as an officer of the court, I can honestly state to you that I can't think of anything that my client could more have done to show remorse, repentance, and an effort at self-rehabilitation.

He has been the object of threats, and these are not spurious threats. They were taken seriously by the district attorney, which resulted in a transfer of certain individuals, and, lastly, by the transfer of the defendant to his present place of incarceration.

This morning, while awaiting for this case to be called, he was the recipient of another threat. And this was because, as your Honor well knows, in this world of prison people, when someone cooperates for the Commonwealth, he becomes a target.

And that is why, before I even get to the -- what I'm going to ask for a sentence, I ask you in the interest of justice and in the interest of this defendant's safety, to make as strong a recommendation as you possibly can to the department of corrections, emphasizing that he has been threatened. And I think the fact that he has been transferred to where he is now by -- at the instigation of Mr. Glenny is sort of a voucher by the Commonwealth that these threats were serious.

I ask that you recommend to the department of corrections in the most forceful language possible that he do whatever sentence you promulgate at a house of correction, preferably where he is now.

I want to also state for the record that my relationship with Mr. Glenny -- this is the first time I've met the gentleman. He's a credit to the district attorney's office and to the criminal justice system. He's a man of his word and he's been a very reasonable man for me to work with. My respect for this particular court is boundless.

May I please read a letter that was sent to me by Major Sterling Bishop. He's the assistant director of human services at the Dukes County Sheriff's Office.

May I read it?

THE COURT: You may.

ATTY. ALCH: Because it's a summary of what my client has attained in a relatively brief period of time.

THE COURT: How long has your client been at the county correctional facility?

ATTY. ALCH: How long have you been there, Chris?

THE DEFENDANT: Almost four months, just about.

ATTY. ALCH: It says, "Christopher Manoloules was transferred to the Dukes County House of Correction on February 4, 2013. Mr. Manoloules immediately identified programs and services that would benefit him in his present situation, as well as his future goals.

"Mr. Manoloules enrolled in the facility's education program, quickly advanced through the GED prep program, and was able to successfully complete all requirements to earn his GED certificate.

"Shortly after learning of his educational accomplishment, he applied for online courses at Cape Cod Community College and was accepted in their business management program.

"He has taken advantage of every opportunity that has been presented to him. He meets with the education coordinator weekly to improve his math skills and is currently enrolled in our anger management, meditation, yoga, and first-aid courses.

"With the continued support that he receives from his family, he has expressed his determination to become a successful individual and an asset to society. It has been

reported by the operations and security department that Mr. Manoloules has been respectful, compliant, and very helpful with any requests for assistance and details throughout the institution.

"Despite not being awarded for his participation, he continues to volunteer for various tasks and spend his time participating in constructive programming.

"Respectfully submitted, Major Sterling Bishop of the Dukes County office -- Sheriff's Office."

I respectfully submit to your Honor that this is not a run-of-the-mill form letter that is simply run off and sent to anybody who requests it.

These are specific allegations that benefit my client and the major would not have put them in writing if they were not true.

So, again, what does this show?

It shows that I can't think of anything else that my client could have done to show that he's trying to straighten his life out. And the way he looks today, he's an entirely different person.

And even today I can only try to understand what he's going through as his father sits in the courtroom along with his mother. He's been through a lot and he's trying to make amends for his past conduct.

I understand the reasoning behind Mr. Glenny's

recommendation.

I think it's too high. I ask you, most respectfully, to consider something less. I'm not going to state a specific recommendation. I don't think it's appropriate at this time under these circumstances. But I submit to you that considering his age -- he's 21 years old -- and considering what he has done voluntarily in a very, very brief period of time at Dukes County House of Correction, that he merits something less than the sentence recommended by Mr. Glenny.

I understand the seriousness of the allegations and the offenses to which he's pleaded, but I ask for some consideration, more than what the State as enumerated to you, to show that he's -- he's getting some quid pro quo for his own self-advancement and for his cooperation with the Commonwealth.

I'm going to leave it your discretion, Judge.

THE COURT: All right. Thank you, Attorney Alch.

ATTY. GLENNY: Your Honor, I didn't mention, but the Commonwealth has no objection to the recommendation that he serve whatever sentence the Court gives at a house of correction institution, especially even where he is now. We have no objection to that at all.

THE COURT: ADA Glenny had indicated to me that he had no problem with my exercising the discretion and the authority that I do have to put on the mittimus under

Chapter 127, and I will, and I wrote out as follows:

"This Court recommends that subsequent to department of correction prisoner transportation and classification consideration be given so as to allow Mr. Manoloules, Christopher, the defendant, to serve his sentence at a county correctional institution due to the alleged prior threats made against said defendant, taking into consideration the personal safety of this particular defendant, Mr. Christopher Manoloules."

So that will be on the mittimus. All right?

ATTY. ALCH: Yes, your Honor.

THE COURT: I have considered the goals of sentencing, and I understand the objectives of sentencing, which are punishment, retribution, and rehabilitation.

I'm pleased to see that he's taking some initiative to take part in educational programs which I'm well aware of in the county system, Attorney Alch, and you know why I'm well aware of those educational programs in the county correctional facilities.

ATTY. ALCH: I do.

THE COURT: He'll also have the opportunity to do so if, in fact, he stays in a state DOC facility, because he can earn time after he serves the mandatory minimums off his sentence.

But I am constrained to follow the Commonwealth's

recommendation, which is 12 to 15 MCI-Cedar Junction, the five/five and a day on the other two counts, and the 10/10 and a day on the minimum mandatory with the armed assault in a dwelling.

So that's my decision. I've had time to reflect.

I was not the trial judge in the other cases. I did handle the motion to suppress on Commonwealth versus Robert Upton.

I bear no ill will towards Mr. Manoloules or anybody else, but that's the recommendation that this Court has with respect to sentencing.

You can consult with Mr. Manoloules. If he wants to withdraw his plea, he has every right to do that; he's not constrained to accept that today. I would ask you to go over and speak with him for a few moments and let him -- let me know if he won't --

ATTY. ALCH: May I --

THE COURT: -- accept this Court's recommendation.

ATTY. ALCH: May I ask one question, take the liberty of asking one question?

In what you wrote on the mittimus to the department of corrections, is it possible for you to make specific references to the Dukes County House of Correction?

THE COURT: If I do that, it would be usurping my authority, but for sure I would urge Attorney Alch to follow

up.

The sheriff of Dukes County could make a request to have him returned, and that would make much more sense and make more of a difference to the state DOC classification team.

He has to be classified first at the reception and diagnostics center. There's nothing I can do or anybody can do to make that not happen.

Right now, he's a pretrial detainee in the custody of the sheriffs. The sheriff of Barnstable County decided to transfer him to Dukes County because of the safety concerns, I'm guessing. If he has not been a state inmate yet, he has to be classified by the state DOC through the Massachusetts -- Code of Massachusetts Regulations, the CMR's, and then after reception and diagnostic, that's when his transfer could possibly take place under Chapter 127, Section 97, I think, is the transfer statute. But I'm just going by vague recollection.

ATTY. ALCH: I see.

May I have a moment with my client?

THE COURT: You may.

(Defendant and counsel confer.)

THE COURT: You want to take a seat, Attorney Alch? Go ahead. There's nothing else going on. Take a seat right over there and talk.

ATTY. ALCH: Thank you.

(Defendant and counsel confer.)

THE COURT: Had sufficient time to speak with your attorney, Attorney Alch?

THE DEFENDANT: Yes.

THE COURT: Attorney Alch.

ATTY. ALCH: My client wishes to maintain his position of changing his plea.

THE COURT: All right.

Is anybody forcing you to do so?

THE DEFENDANT: No.

THE COURT: You understand the sentence?

THE DEFENDANT: Yes.

THE COURT: All right. The clerk is directed to enter it into the record.

THE CLERK: Thank you, Judge.

Christopher Manoloules, the Court having accepted your plea of guilty on Indictment 158-01 as amended to charging you with manslaughter, the Court sentences you to the Massachusetts Correctional Institution at Cedar Junction for a term of not more than 15 years and not less than 12 years.

Indictments 158-02, charging you with armed assault with intent to murder or rob, and 158-03, charging you with aggravated assault and battery with a dangerous weapon, on each of those indictments, concurrently, the Court sentences you to the Massachusetts Correctional Institution at

Cedar Junction for a term of not more than five years and one day and not less than five years, both sentences to run concurrent with the sentence imposed in 158-01.

Indictment 158-04, charging you with armed assault in a dwelling house, the Court sentences you to the Massachusetts Correctional Institution at Cedar Junction for a term of not more than 10 years and one day and not less than 10 years, said sentence to run concurrently with the sentence imposed in 158-01.

You are assessed a $90 Victim/Witness fee.

You're hereby notified of your obligation to provide a sample of your DNA within one year of this date pursuant to General Laws Chapter 22E, Sections 1 through 15. Failure to comply, may be assessed $1,000 fine, imprisonment in a house of correction for up to six months, or both.

You have a right to receive credit for time served and you have a right to appeal to the appellate division of the Superior Court within 10 days for review of this sentence.

Judge, the mitt will reflect the language: "The Court recommends the defendant serves the sentence in the house of correction pursuant to General Laws Chapter 127, Section 97."

Sir, you stand committed.

THE COURT: Thank you, ADA Glenny, Attorney Alch.

ATTY. GLENNY: Thank you, your Honor.

(Proceedings concluded at 3:30 p.m.)

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS. SUPERIOR COURT
Case No. BACR2009-158

****

COMMONWEALTH OF MASSACHUSETTS

vs.

CHRISTOPHER MANOLOULES,
Defendant.

****

CHANGE OF PLEA/DISPOSITION

BEFORE THE HONORABLE ROBERT C. RUFO,
ASSOCIATE JUSTICE OF THE SUPERIOR COURT

May 29, 2013
Barnstable, Massachusetts

Main Session

APPEARANCES

FOR THE COMMONWEALTH: BRIAN S. GLENNY, ESQ.
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Barnstable, Massachusetts

May 29, 2013

(REPORTER'S NOTE: If this transcript contains quoted material, such material is reproduced as read or quoted by the speaker. "Uh-huh" or (Nods.) denotes an affirmative response; "Unh-unh" or (Shakes head.) denotes a negative response. "[Ph]" denotes a phonetic spelling, and "[sic]" denotes "as read or spoken by the speaker.")

(REPORTER'S NOTE: Pursuant to 201 CMR 17.00, personal information is required to be redacted. The full testimony is retained in the reporter's original notes. Personal information to be redacted is dependent upon the specific circumstances, which includes name, social security or license number, account numbers, et cetera, pursuant to the CMR.)

* * * P R O C E E D I N G S * * *

(2:50 p.m.)

(Defendant present.)

THE CLERK: This is Commonwealth versus Christopher Manoloules. The defendant is in the dock.

I believe this is a change of plea.

Are we going forward with the indictments as drawn?

ATTY. GLENNY: No, your Honor.

As to the first indictment, the Commonwealth would be nolle prosing as much that alleges anything more than

manslaughter. The other three will remain as they are drafted.

THE COURT: Advice and consent of defendant?

ATTY. ALCH: Yes, your Honor.

THE COURT: All right.

THE CLERK: Christopher Manoloules, on Indictment 158-01, as amended to charging you with manslaughter, do you wish to change your plea from not guilty to guilty?

THE DEFENDANT: Yes.

THE CLERK: Indictment 158-02, charging you with armed assault with intent to murder or rob, do you wish to change your plea from not guilty to guilty?

THE DEFENDANT: Yes.

THE CLERK: 158-03, charging you with aggravated assault and battery by a dangerous weapon, sir, do you wish to change your plea from not guilty to guilty?

THE DEFENDANT: Yes.

THE CLERK: And on 158-04, charging you with armed assault in a dwelling house, sir, do you wish to change your plea from not guilty to guilty?

THE DEFENDANT: Yes.

THE CLERK: Please come over here to the witness stand.

Sir, raise your right hand as best you can.

(DEFENDANT SWORN.)

THE DEFENDANT: Yes.

CHRISTOPHER MANOLOULES, sworn:

EXAMINATION

BY THE COURT:

Q Good afternoon, Mr. Manoloules.

A Good afternoon.

Q My name is Robert Rufo. I'm a judge here in the Superior Court in Barnstable County. It's now my obligation to ask you a series of questions to ensure that you are giving up the rights that you're giving up today by pleading guilty rather than exercising your right to a trial before a judge or a jury; that you're doing so freely, voluntarily, knowingly, and intelligently, not because someone's forcing you or pressuring you to do so.

If at any time during my questioning of you you wish to speak with your attorney, Attorney Alch, just tell me to stop, I'll allow you to speak with him in private, we'll go on from there.

Do you understand, sir?

A Yes.

Q I need you to keep your voice up nice and loud because we're not only recording this but we have a court reporter that's taking a transcript of this discussion.

Do you understand?

A Yes.

Q State your name.

A Christopher Manoloules.

Q How old are you, sir?

A Twenty-one.

Q How far have you gone in school?

A Just got my GED.

Q You can read and write in English?

A Yes.

Q Do you speak any other language?

A No.

Q What was your occupation prior to incarceration?

A I was in high school.

Q Did you ever hold a job?

A Did landscaping before.

Q Okay. Could you keep your voice up because I'm having trouble hearing you.

A Yeah. I did some landscaping before.

Q Under the influence of illegal drugs or alcohol today?

A No.

Q Taking any prescription medication as prescribed by the healthcare professionals at the correctional institution?

A No.

Q Being treated for any ailment whatsoever?

A No.

Q Ever suffer from a mental, psychological, or emotional condition?

A No.

Q Ever visited a psychologist or a psychiatrist?

A No.

Q Understand today you're offering to change your plea to the reduced charge that has been made by a motion by the Commonwealth to manslaughter, armed assault with intent to murder or rob, aggravated assault and battery by means of a dangerous weapon, and armed assault in a dwelling or a house. Am I correct on that?

ATTY. ALCH: Yes.

A Yes.

THE COURT: Consult with your attorney.

(Defendant and counsel confer.)

A Yes.

BY THE COURT:

Q So I understand you wish to change your plea from not guilty to guilty to manslaughter; right?

A Yes.

Q Armed assault with intent to murder or rob?

A Yes.

Q Aggravated assault and battery by means of a dangerous weapon?

A Yes.

Q And armed assault in a dwelling or house?

A Yes.

Q Is anybody forcing you to do that today?

A No.

Q Now, I also understand that there's been a discussion between the Commonwealth and your attorney with respect to recommendation of a sentence, and what I'm going to do is ask you several questions in connection with your decision to change your plea. If at the conclusion of my discussion of you you don't wish to accept the Court's recommendation, I'll allow you to withdraw the plea and then the matter's going to be scheduled for trial before a judge or a jury.

Do you understand that?

A Yes.

Q Okay. So at this particular point in time, I'm going to call upon the Commonwealth's prosecutor, ADA Glenny, who's going to recite the facts that he believes the Commonwealth could prove beyond a reasonable doubt with respect to those offenses that I've just outlined for you.

After that, I'll have some further questions for you, sir. Do you understand?

A Yes.

THE COURT: ADA Glenny.

ATTY. GLENNY: Thank you, your Honor.

On or about September 29th of 2009, a plan including Mr. Manoloules here, Christopher, and Robert Upton and another, was hatched in which they'd come down to the Cape and attempt to steal from Christopher Manoloules's uncle money and/or jewelry or any other things of value that might be able to be found.

Robert Upton, who would be the maternal uncle of Mr. Christopher Manoloules, was also part of that plan. He came down -- actually drove down to the Cape, being armed at that time; known to Mr. Christopher Manoloules that he was, in fact, armed.

Once arriving here at the Cape, they did go to the home or the Cape Cod home of Aris Manoloules, who would be the paternal uncle of Christopher Manoloules and the target of this crime, and entered into that dwelling house. At that time, Christopher Manoloules knew that Robert Upton was armed.

While in the house, Christopher Manoloules then attempted to see if he could find anything of value and which to steal. That did not prove to be fruitful. There had been a discussion in the kitchen area and he related that information to Robert Upton, who then took the firearm from his person, walked into the living room and shot and killed Aris Manoloules.

After that, they left the residence and fled.

Those would be the essential facts for these charges,

your Honor.

BY THE COURT:

Q Mr. Manoloules, did you hear the Commonwealth's prosecutor, ADA Glenny, recite the facts to me that he believes he could prove beyond a reasonable doubt if this case were to go to trial?

A Yes.

Q Do those facts fairly and accurately describe your conduct in this particular case, sir?

A Yes.

Q Is there anything that was just described to me that you don't believe to be fair or accurate?

A No.

Q Do you understand by pleading guilty that you're admitting to the truth that would -- of the facts that were just stated to me?

A Yes.

Q You understand that -- you're pleading guilty because you are guilty and for no other reason?

A Yes.

Q Is that what you wish to do today, sir?

A Yes.

Q Has anybody forced you to do that?

A No.

Q Have you had sufficient time to discuss all your options

with your attorney, Attorney Gerald Alch?

A Yes.

Q Do you have any questions for him at this particular point in time?

A No.

Q Sir, you should understand today you're giving up your right to a trial before a judge or a jury.

This matter could be tried in front of a jury. A jury is comprised of 12 persons randomly selected from the community at large. You and your attorney, Attorney Alch, would have the right and the privilege to participate in the selection process of who would sit on the jury.

During the course of jury selection or jury impanelment, you, through your attorney, would be able to challenge any juror for a stated reason, for cause. You would also have the right to challenge a number of jurors for no stated reason at all. We call that a peremptory challenge.

Once the jury was impaneled and convened, they alone would decide your guilt or innocence. They would do so with the Commonwealth at all times bearing the full burden of proof that we call in court beyond a reasonable doubt.

The burden of proof never shifts. You are presumed innocent under our laws.

During the course of the trial, the jury would be instructed by the Court on the law. The judge would instruct

the jury at the end of the trial on what the law is. The jury alone would decide -- have to decide unanimously, a jury of 12, as to whether or not you were guilty or not guilty of some or all of the charges for which you stand accused.

Do you understand today you're giving up your right to a trial by jury as I very briefly outlined it for you?

A Yes.

Q Additionally, you're giving up your right to a trial by a judge. You could waive the jury, have a judge. He or she would listen to the same evidence produced by the Commonwealth, understanding the same bedrock constitutional principles:

That you retain the presumption of innocence; that the Commonwealth has to prove the essential elements of these offenses against you by that standard of proof "beyond a reasonable doubt." The judge would then determine the facts as he or she found them to be, apply those facts to the law as the judge understands the law to be, and decide whether you were guilty or not guilty of some or all of the offenses for which you stand accused.

Do you understand you're giving up your right to a trial by a judge, a so-called "jury-waived" or "bench trial," today, sir?

A Yes.

Q Has anybody forced you to do that?

A No.

THE COURT: I'm having trouble hearing your client, Attorney Alch.

ATTY. ALCH: Please talk louder.

A No.

BY THE COURT:

Q Sir, do you understand that as to whether or not you decide to have a trial before a judge or a jury that you're giving up your so-called "right of confrontation" guaranteed to you under the Sixth Amendment of the Constitution of the United States. You have the right to confront the government's witnesses who would be called to testify against you. You, through your attorney, would have the right to cross-examine these witnesses in an attempt to impeach their credibility.

Do you understand you're giving up your right of confrontation today, sir, through cross-examination, your right to confront the government's witnesses who will be called to testify against you?

A Yes.

Q Anybody forced you to do that?

A No.

Q Also, sir, you would have the right -- although you're not obliged to -- to call witnesses and produce evidence in your own defense. You're giving that up today by pleading

guilty. Do you understand?

A Yes.

Q Has anybody forced you to do that?

A No.

Q You do so freely and voluntarily?

A Yes.

Q Also, in connection with your decision to give up your right to a trial before a judge or a jury, you're giving up your privilege against self-incrimination. This is your right to remain silent. No one can force you or place you in a position to infer your guilt. You have the right to remain silent. The fact that you chose to remain silent during the course of your jury trial, at your request the judge would instruct the jury that they could not infer any adverse inference from the fact that you chose to retain your Fifth Amendment privilege against self-incrimination, your so-called "right to remain silent."

Do you understand you're giving that up today by pleading guilty to these charges?

A Yes.

Q Is that what you wish to do today, sir?

A Yes.

Q Anybody force you to do that?

A No.

Q Sir, you're also giving up your right to file any motions

to dismiss some or all of the indictments, motions to suppress evidence that may have been collected at the time of the offense. You're giving up your right to have those motions heard; appeal a denial of the motions, if the motions were denied; or giving up your opportunity to have a motion allowed by the Court.

Do you understand that you're giving up your right to file or to have heard motions to dismiss, motions to suppress evidence?

A Yes.

Q Have you discussed that with Attorney Alch?

A Ah. Yeah. Yes.

THE COURT: Were there any such motions filed in this case, Attorney Alch?

ATTY. ALCH: No, your Honor.

THE COURT: Okay.

BY THE COURT:

Q Sir, Mr. Manoloules, it's my obligation to inform you that if you're not a citizen of the United States, you must assume that the acceptance by this Court of your change of plea from not guilty to guilty to these charges will have the consequences of deportation, exclusion from the United States, or denial of your naturalization of citizenship.

Do you understand?

A Yes.

Q Has that in any way affected your decision to change your plea from not guilty to guilty?

A No.

Q Sir, you'll also be required within one year to submit a sample of your DNA for inclusion in the so-called "DNA state database," for the state police to include your DNA in the state police DNA database, and there's a fee in connection with that as well.

Do you understand you will be required to do that as a result of your change of plea from not guilty to guilty?

A Yes.

Q Has that in any way affected your decision to change your plea today from not guilty to guilty?

A No.

Q You've had the advice and counsel of Attorney Alch.

A Yes.

Q Pleased and satisfied with his legal representation of you, his recommendations to you today with respect to disposition in this particular case?

A Well -- what? I didn't hear that last part.

Q Sure. You've had legal representation from Attorney Gerald Alch, the gentleman who's standing beside you?

A Yeah. It was the last part I didn't -- yes.

Q Let me take you through the questions; all right?

You're familiar with Attorney Alch?

A Yes.
Q You've had a chance to speak with him?
A Yes.
Q Pleased and satisfied with his legal representation of you? His advice, his recommendations to you today concerning the ultimate disposition on this matter?
A Yes.
Q Do you have any questions for Attorney Alch at this time?
A No.
Q Has anybody threatened you or pressured you to change your plea from not guilty to guilty?
A No.
Q Are you confused by any of the questions I've asked you so far?
A No.
Q Do you understand all the questions I've asked so far?
A Yes.

THE COURT: Attorney Alch, do you know of any reason why I should not accept Mr. Manoloules's change of plea from not guilty to guilty?

ATTY. ALCH: No, your Honor.

THE COURT: ADA Glenny, do you know of any reason why I should not accept Mr. Manoloules's change of plea from not guilty to guilty?

ATTY. GLENNY: I do not.

THE COURT: All right.

BY THE COURT:

Q Mr. Manoloules, I'm going to show you this form. Ask you if you recognize this document?

A Yes.

Q Did you have a chance to read it?

A Yes.

Q Did you go over it with Attorney Alch?

A No.

Q No?

A We didn't go over it.

Q All right. Take a moment. Sit right there in the front row with Attorney Alch. I want you to read it with him.

THE COURT: Attorney Alch, would you sit with your client and go over the waiver of rights form.

ATTY. ALCH: I will, your Honor.

THE COURT: Thank you.

Scott.

(Clerk and Court confer.)

(Defense counsel and defendant confer.)

BY THE COURT:

Q Sir, do you recognize this document?

A Yes.

Q Did you have a chance to read it with Attorney Alch?

A Yes.

Q You should understand that this form sets forth in writing the rights and other matters that I just explained to you in greater detail.

A Yes.

Q Did you read it in English?

A Yes.

Q Do you have any questions about that document?

A No.

Q You should understand that your signature indicates that you're aware of the rights that I've explained to you in greater detail, that you understand them, and that you're giving them up today; that is, your right to a trial by jury, right to trial by judge, and the other matters that I've discussed with you in greater detail. They're all contained on that form.

Did you recognize that?

A Yes.

Q Did you sign the document?

A Yes.

Q Is that your signature, sir?

A Yes.

Q What's the date of your signature?

A May 29.

Q Did anyone force you to do so?

A No.

Q You do so freely and voluntarily?

A Yes.

Q All right.

THE COURT: I'm going to accept the change of plea. Find that there is a factual basis for the change of plea from not guilty to guilty for the offenses known as manslaughter, armed assault with intent to murder or rob, aggravated assault and battery by means of a dangerous weapon, and the armed assault in a dwelling or a house.

I find that the defendant, Mr. Christopher Manoloules, is not under the influence of illegal drugs or alcohol, suffering from a mental condition or illness that would prevent him from freely, voluntarily, knowingly, and intelligently waiving the rights that I've gone over with him in greater detail. I find that he understands the consequence of his change of plea. The plea was offered knowing, willingly, intelligently, voluntarily.

The clerk is directed to accept the change of plea.

THE CLERK: Thank you, Judge.

Christopher Manoloules, on Indictment 158-01, as amended to charging you with manslaughter, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: 158-02, charging you with armed assault with intent to murder or rob, sir, how do you plead, guilty or

not guilty?

THE DEFENDANT: Guilty.

THE CLERK: 158-03, charging you with aggravated assault and battery with a dangerous weapon, sir, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: And on Indictment 158-04, charging you with armed assault in a dwelling house, sir, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Commonwealth move for sentencing?

ATTY. GLENNY: Yes, your Honor.

I would just like a moment to address -- there are attorneys here for one of the brothers of the victim, see if they want to be heard.

(Pause.)

ATTY. GLENNY: They don't wish to address the Court, your Honor.

THE COURT: Are there victim impact statements that I should see?

ATTY. GLENNY: No. No.

Your Honor, just with respect to the factual basis of the case, I know that you were the judge that actually heard the motion to suppress in the Robert Upton case and so you kind of have more of a feeling for what the case was all about and how

Christopher Manoloules's role in the case.

Beyond the facts that I just gave, the Commonwealth's position has always been that he was used in this situation; you know, not completely unknowingly, but certainly not to the extent that I think he thought this was all going to play out in the end.

He, at the very early stage after this case became known to the police, offered to cooperate with the authorities in the matter and he, in fact, testified in two of the trials that took place in this Barnstable Superior Court, your Honor.

And, for the record, there was never an offer made to Mr. Manoloules or his attorney during the pendency of either of those two cases. In fact, no discussions concerning a change of plea were ever openly discussed at all until after the completion of the trial of Robert Upton, which was the second in time of the trials.

With that being said, your Honor, the Commonwealth, in light of the fact that he did cooperate and he did, in fact, testify in those two cases, agreed to reduce this to a manslaughter, and we're recommending on that charge a 12-to-15-year MCI-Cedar Junction commitment.

On the assault to rob or murder, the armed assault to rob or murder, we're recommending a five to five and a day, concurrent. And I believe there's a five-year mandatory, and that's why I'm saying five to five and a day.

And then with respect to the aggravated assault and battery by means of a dangerous weapon, also a five to five and a day, concurrent.

And then with the assault in a dwelling, armed assault in a dwelling, a 10 to 10 and a day, and that's because there's a 10-year mandatory; but that, again, concurrent, your Honor, with the 12 to 15 that we're recommending.

THE COURT: All right.

Attorney Alch.

ATTY. ALCH: Yes, your Honor.

Your Honor, one of the key words uttered by Mr. Glenny was that my client was "used," and I heartily endorse that description. He was used. He was a young man at the time these offenses were committed.

I vividly remember the first time I saw him, and he certainly doesn't look today the way he looked then. He was in his own personal hell. It took me a while -- a long while to gain his confidence so that he would relate to me the facts as he knew them.

Once he did, we discussed his options, and he expressed to me the desire to do the right thing. And that led to his being debriefed by Mr. Glenny and the state police. After he was debriefed, they checked his story for veracity. It passed that test. He went before a grand jury. An indictment was returned as a result of his testimony.

And these were very, very uncomfortable circumstances for this young man, because one of -- the indictment that was brought down as a result of his testimony was against his own father, who is in the courtroom today with his mother, who testified for his father in his father's trial.

And I can't appreciate the difficulty that he must have experienced, again, being in the middle of things, and he understood and realized the perplexities involved and the emotional tugs of war inside of him that were in play when he testified against his father; and then to a lesser degree, but just as significantly, against his mother's brother, his uncle.

So as an officer of the court, I can honestly state to you that I can't think of anything that my client could more have done to show remorse, repentance, and an effort at self-rehabilitation.

He has been the object of threats, and these are not spurious threats. They were taken seriously by the district attorney, which resulted in a transfer of certain individuals, and, lastly, by the transfer of the defendant to his present place of incarceration.

This morning, while awaiting for this case to be called, he was the recipient of another threat. And this was because, as your Honor well knows, in this world of prison people, when someone cooperates for the Commonwealth, he becomes a target.

And that is why, before I even get to the -- what I'm going to ask for a sentence, I ask you in the interest of justice and in the interest of this defendant's safety, to make as strong a recommendation as you possibly can to the department of corrections, emphasizing that he has been threatened. And I think the fact that he has been transferred to where he is now by -- at the instigation of Mr. Glenny is sort of a voucher by the Commonwealth that these threats were serious.

I ask that you recommend to the department of corrections in the most forceful language possible that he do whatever sentence you promulgate at a house of correction, preferably where he is now.

I want to also state for the record that my relationship with Mr. Glenny -- this is the first time I've met the gentleman. He's a credit to the district attorney's office and to the criminal justice system. He's a man of his word and he's been a very reasonable man for me to work with. My respect for this particular court is boundless.

May I please read a letter that was sent to me by Major Sterling Bishop. He's the assistant director of human services at the Dukes County Sheriff's Office.

May I read it?

THE COURT: You may.

ATTY. ALCH: Because it's a summary of what my client has attained in a relatively brief period of time.

THE COURT: How long has your client been at the county correctional facility?

ATTY. ALCH: How long have you been there, Chris?

THE DEFENDANT: Almost four months, just about.

ATTY. ALCH: It says, "Christopher Manoloules was transferred to the Dukes County House of Correction on February 4, 2013. Mr. Manoloules immediately identified programs and services that would benefit him in his present situation, as well as his future goals.

"Mr. Manoloules enrolled in the facility's education program, quickly advanced through the GED prep program, and was able to successfully complete all requirements to earn his GED certificate.

"Shortly after learning of his educational accomplishment, he applied for online courses at Cape Cod Community College and was accepted in their business management program.

"He has taken advantage of every opportunity that has been presented to him. He meets with the education coordinator weekly to improve his math skills and is currently enrolled in our anger management, meditation, yoga, and first-aid courses.

"With the continued support that he receives from his family, he has expressed his determination to become a successful individual and an asset to society. It has been

reported by the operations and security department that Mr. Manoloules has been respectful, compliant, and very helpful with any requests for assistance and details throughout the institution.

"Despite not being awarded for his participation, he continues to volunteer for various tasks and spend his time participating in constructive programming.

"Respectfully submitted, Major Sterling Bishop of the Dukes County office -- Sheriff's Office."

I respectfully submit to your Honor that this is not a run-of-the-mill form letter that is simply run off and sent to anybody who requests it.

These are specific allegations that benefit my client and the major would not have put them in writing if they were not true.

So, again, what does this show?

It shows that I can't think of anything else that my client could have done to show that he's trying to straighten his life out. And the way he looks today, he's an entirely different person.

And even today I can only try to understand what he's going through as his father sits in the courtroom along with his mother. He's been through a lot and he's trying to make amends for his past conduct.

I understand the reasoning behind Mr. Glenny's

recommendation.

I think it's too high. I ask you, most respectfully, to consider something less. I'm not going to state a specific recommendation. I don't think it's appropriate at this time under these circumstances. But I submit to you that considering his age -- he's 21 years old -- and considering what he has done voluntarily in a very, very brief period of time at Dukes County House of Correction, that he merits something less than the sentence recommended by Mr. Glenny.

I understand the seriousness of the allegations and the offenses to which he's pleaded, but I ask for some consideration, more than what the State as enumerated to you, to show that he's -- he's getting some quid pro quo for his own self-advancement and for his cooperation with the Commonwealth.

I'm going to leave it your discretion, Judge.

THE COURT: All right. Thank you, Attorney Alch.

ATTY. GLENNY: Your Honor, I didn't mention, but the Commonwealth has no objection to the recommendation that he serve whatever sentence the Court gives at a house of correction institution, especially even where he is now. We have no objection to that at all.

THE COURT: ADA Glenny had indicated to me that he had no problem with my exercising the discretion and the authority that I do have to put on the mittimus under

Chapter 127, and I will, and I wrote out as follows:

"This Court recommends that subsequent to department of correction prisoner transportation and classification consideration be given so as to allow Mr. Manoloules, Christopher, the defendant, to serve his sentence at a county correctional institution due to the alleged prior threats made against said defendant, taking into consideration the personal safety of this particular defendant, Mr. Christopher Manoloules."

So that will be on the mittimus. All right?

ATTY. ALCH: Yes, your Honor.

THE COURT: I have considered the goals of sentencing, and I understand the objectives of sentencing, which are punishment, retribution, and rehabilitation.

I'm pleased to see that he's taking some initiative to take part in educational programs which I'm well aware of in the county system, Attorney Alch, and you know why I'm well aware of those educational programs in the county correctional facilities.

ATTY. ALCH: I do.

THE COURT: He'll also have the opportunity to do so if, in fact, he stays in a state DOC facility, because he can earn time after he serves the mandatory minimums off his sentence.

But I am constrained to follow the Commonwealth's

recommendation, which is 12 to 15 MCI-Cedar Junction, the five/five and a day on the other two counts, and the 10/10 and a day on the minimum mandatory with the armed assault in a dwelling.

So that's my decision. I've had time to reflect.

I was not the trial judge in the other cases. I did handle the motion to suppress on Commonwealth versus Robert Upton.

I bear no ill will towards Mr. Manoloules or anybody else, but that's the recommendation that this Court has with respect to sentencing.

You can consult with Mr. Manoloules. If he wants to withdraw his plea, he has every right to do that; he's not constrained to accept that today. I would ask you to go over and speak with him for a few moments and let him -- let me know if he won't --

ATTY. ALCH: May I --

THE COURT: -- accept this Court's recommendation.

ATTY. ALCH: May I ask one question, take the liberty of asking one question?

In what you wrote on the mittimus to the department of corrections, is it possible for you to make specific references to the Dukes County House of Correction?

THE COURT: If I do that, it would be usurping my authority, but for sure I would urge Attorney Alch to follow

up.

The sheriff of Dukes County could make a request to have him returned, and that would make much more sense and make more of a difference to the state DOC classification team.

He has to be classified first at the reception and diagnostics center. There's nothing I can do or anybody can do to make that not happen.

Right now, he's a pretrial detainee in the custody of the sheriffs. The sheriff of Barnstable County decided to transfer him to Dukes County because of the safety concerns, I'm guessing. If he has not been a state inmate yet, he has to be classified by the state DOC through the Massachusetts -- Code of Massachusetts Regulations, the CMR's, and then after reception and diagnostic, that's when his transfer could possibly take place under Chapter 127, Section 97, I think, is the transfer statute. But I'm just going by vague recollection.

ATTY. ALCH: I see.

May I have a moment with my client?

THE COURT: You may.

(Defendant and counsel confer.)

THE COURT: You want to take a seat, Attorney Alch? Go ahead. There's nothing else going on. Take a seat right over there and talk.

ATTY. ALCH: Thank you.

(Defendant and counsel confer.)

THE COURT: Had sufficient time to speak with your attorney, Attorney Alch?

THE DEFENDANT: Yes.

THE COURT: Attorney Alch.

ATTY. ALCH: My client wishes to maintain his position of changing his plea.

THE COURT: All right.

Is anybody forcing you to do so?

THE DEFENDANT: No.

THE COURT: You understand the sentence?

THE DEFENDANT: Yes.

THE COURT: All right. The clerk is directed to enter it into the record.

THE CLERK: Thank you, Judge.

Christopher Manoloules, the Court having accepted your plea of guilty on Indictment 158-01 as amended to charging you with manslaughter, the Court sentences you to the Massachusetts Correctional Institution at Cedar Junction for a term of not more than 15 years and not less than 12 years.

Indictments 158-02, charging you with armed assault with intent to murder or rob, and 158-03, charging you with aggravated assault and battery with a dangerous weapon, on each of those indictments, concurrently, the Court sentences you to the Massachusetts Correctional Institution at

Cedar Junction for a term of not more than five years and one day and not less than five years, both sentences to run concurrent with the sentence imposed in 158-01.

Indictment 158-04, charging you with armed assault in a dwelling house, the Court sentences you to the Massachusetts Correctional Institution at Cedar Junction for a term of not more than 10 years and one day and not less than 10 years, said sentence to run concurrently with the sentence imposed in 158-01.

You are assessed a $90 Victim/Witness fee.

You're hereby notified of your obligation to provide a sample of your DNA within one year of this date pursuant to General Laws Chapter 22E, Sections 1 through 15. Failure to comply, may be assessed $1,000 fine, imprisonment in a house of correction for up to six months, or both.

You have a right to receive credit for time served and you have a right to appeal to the appellate division of the Superior Court within 10 days for review of this sentence.

Judge, the mitt will reflect the language: "The Court recommends the defendant serves the sentence in the house of correction pursuant to General Laws Chapter 127, Section 97."

Sir, you stand committed.

THE COURT: Thank you, ADA Glenny, Attorney Alch.

ATTY. GLENNY: Thank you, your Honor.

(Proceedings concluded at 3:30 p.m.)

Commonwealth v. Green

Appeals Court of Massachusetts

August 4, 2017, Entered

10-P-2086

Reporter
2017 Mass. App. Unpub. LEXIS 773 *; 92 Mass. App. Ct. 1102; 87 N.E.3d 1200; 2017 WL 3317888

COMMONWEALTH *vs.* ***JULIAN*** M. ***GREEN***.

Notice: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28 ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008)*.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

Subsequent History: Appeal denied by *Commonwealth v.* ***Green****, 478 Mass. 1103, 2017 Mass. LEXIS 792 (Mass., Nov. 6, 2017)*

Prior History: *Commonwealth v.* ***Green****, 2010 Mass. Super. LEXIS 169 (Mass. Super. Ct., June 25, 2010)*

Disposition: Judgments affirmed. Order denying motion for new trial affirmed.

Judges: Massing, Shin & Ditkoff, JJ. **[*1]**

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A jury convicted the defendant, ***Julian Green***, of murder in the second degree and other crimes[1] after the shooting death of Jacques Sellers. The trial judge subsequently denied the defendant's motion for a new trial. In this consolidated appeal, we affirm the judgments and the order denying the new trial motion.

Background. We outline the facts in the light most favorable to the Commonwealth, see *Commonwealth v. Latimore, 378 Mass. 671, 676-677, 393 N.E.2d 370 (1979)*, reserving some specifics for later discussion. On the evening of July 18, 2007, shots from two different guns were fired into the residence at 36 General Patton Drive in Hyannis, where several people were gathered, killing the victim. Carrie Perry, who was in the house and heard the shots, lifted the shades of her bedroom window and saw "two young black Americans in jean shorts with hoodies on" running "right in the middle of the road where it was all bright." She did not see either man's face and "couldn't identify who [they] really [were]."

Jessica Schwenk, the defendant's girl friend at the time of the shooting, testified that she was with the defendant at her grandmother's house in West Dennis in the early evening hours of July **[*2]** 18 when the defendant said that his friend, Anthony Russ, "needed him" in Hyannis. Schwenk drove the defendant to Yarmouth, where she dropped him off at a hotel. She then drove to General Patton Drive in Hyannis, as the defendant had instructed her.

Schwenk had previously seen the defendant with a "silver gun," specifically, "[a] revolver." A few days earlier, the defendant had left his gun with Jill Parsons in a brown paper bag on a shelf in the garage of her house in South Yarmouth. On the evening of the shooting he called Parsons and asked her "[t]o grab the thing that was in the garage" and bring it to

[1] Assault by means of a dangerous weapon (two counts), discharging a firearm within 500 feet of a dwelling, possession of a firearm without a firearms identification card, and assault and battery by means of a dangerous weapon. The latter charge was placed on file with the defendant's consent and is not before us.

him at the CVS pharmacy down the street from her. Parsons wrapped the paper bag with the gun in it in a sweatshirt, and a friend drove her to the CVS. The defendant, who was there with Schwenk, took the bag, thanked Parsons, and got back into Schwenk's car.

When Schwenk later arrived at General Patton Drive as instructed, she saw the defendant and Anthony Russ. One of them told her to drive her car "[t]o the next street over" and wait. Schwenk waited for a few minutes, then the defendant and Russ came back to her car. She drove them to the end of the road, where the defendant and Russ got **[*3]** out and ran into the woods. When Schwenk saw the defendant later that night and the following day, he told her that he had been "with Anthony [Russ]," that "he shot the house" because "he was helping a friend."

At trial, Schwenk read portions of letters that the defendant wrote to her after the shooting. The defendant wrote, "The night I met AV, I knew what time it was. We was going there to lay dude down; and that's what we did." He also stated, "I shot a gun four times in the house," and, "I can't stop thinking about that night, me firing my gun with that clown." Although he admitted, "what I did that night was wrong," he wrote that someone else "should take the rap for [this] shit. . . . This case is so fucking stupid. I didn't have a glove or a fucking black hoodie." He continued in this vein, "I also found out that the gun I 'used' wasn't the gun that killed the kid."[2] One of the letters was signed, "Jules. Free Jules, GP gunner."

The defense at trial was that Todd Lampley and Devarus Hampton, not the defendant and Russ, were responsible for the shooting. In this regard, defense counsel elicited testimony from Carrie Perry on cross-examination that the two men she saw fleeing from **[*4]** the crime scene resembled "Todd and Baby Bro," that is, Lampley and Hampton. Rodney Ferguson, who visited 36 General Patton Drive "[p]ractically every day," and was in the house at the time of the shooting, had beaten up Lampley "a few times" for "putting his hands on [Ferguson's] daughter's mom." Although he did not see the shooter, Ferguson testified on cross-examination that it was his "personal belief" that the "Mississippi guys," Lampley and Hampton, fired the shots into the house because of Ferguson's problem with Lampley. Hampton, testifying under an order of immunity, confirmed during cross-examination that Lampley had a "beef" with Ferguson.

Hours after the shooting, a Barnstable police officer assigned to the canine unit positioned his dog in the driveway across the street from 36 General Patton Drive, the "last known area of the suspects." The dog tracked the scent to 23 General Patton Drive, Lampley's residence, where it lost the scent.

Discussion. 1. *Newly discovered evidence*. During the defendant's trial, the Commonwealth obtained an order of immunity to allow defense counsel to cross-examine Hampton. Still, Hampton was a recalcitrant witness and testified repeatedly that he did not **[*5]** recall the events of July 18. Hampton denied that Lampley ever told him that a police dog had tracked Lampley's scent to his house that night. In his new trial motion the defendant offered a transcript of Hampton's testimony at Russ's trial, held several months after the defendant's, in which Hampton testified that Lampley "made a statement about something about a shooting"; "mentioned something about the canine dog going to the spot where he was standing in, and he got away lucky or something"; and said that "[h]im and his — his homeboy, it sounds like they (inaudible) the situation." The defendant contends that Hampton's testimony at Russ's trial, which ended in Russ's acquittal, constitutes newly discovered evidence warranting a new trial in his case.

"A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction." *Commonwealth v. Grace, 397 Mass. 303, 305, 491 N.E.2d 246 (1986)*. Evidence is newly discovered if it was "unavailable at the time of trial and could not have been discovered with reasonable diligence." *Commonwealth v. LeFave, 430 Mass. 169, 176, 714 N.E.2d 805 (1999)*. Newly discovered evidence casts real doubt on the justice of conviction if "there is a substantial risk **[*6]** that the jury would have reached a different conclusion had the evidence been admitted at trial." *Grace, supra at 306*. In determining whether the motion judge erred in his denial of a motion for new trial based on newly discovered evidence, we "examine the motion judge's conclusion only to determine whether there has been a significant error of law or other abuse of discretion." *Id. at 307*. "[W]e accord special deference to the action of a motion judge who was also the trial judge." *Commonwealth v. Shuman, 445 Mass. 268, 272, 836 N.E.2d 1085 (2005)*.

We discern no error of law or abuse of discretion in the judge's determination that Hampton's testimony at Russ's trial did not amount to newly discovered evidence. The fundamental flaw in the defendant's claim is the fact that Hampton testified at his trial and, as the judge found, was "thoroughly cross-examined" by defense counsel. That Hampton later testified to a different version of events does not transform the later testimony into newly discovered

[2] The evidence supported the proposition that the defendant fired his gun into the house several times, but that the fatal shot came from a different gun. The Commonwealth proceeded on a joint venture theory.

evidence.

Even if Hampton's later testimony amounted to newly discovered evidence, the defendant has not demonstrated that "the new evidence offered create[d] a substantial risk that a jury exposed to that evidence would have reached a different conclusion." *Commonwealth v. Markham, 10 Mass. App. Ct. 651, 654, 411 N.E.2d 494 (1980)* (footnote omitted). **[*7]** In evaluating whether the jury would have reached a different conclusion had the newly discovered evidence been admitted at trial, "the evidence said to be new not only must be material and credible but also must carry a measure of strength in support of the defendant's position." *Grace, supra at 305* (citation omitted).

The judge found that Hampton was a man of "questionable character," whose conflicting testimony concerning his understanding of immunity was an attempt to "shield himself from perjury and allow him to sow doubt in both cases." "[T]he motion judge properly '[took] into account his knowledge of what occurred at trial [in order to] assess questions of credibility.'" *Commonwealth v. Spray, 467 Mass. 456, 472, 5 N.E.3d 891 (2014)*, quoting from *Commonwealth v. Ortiz, 393 Mass. 523, 536-537, 471 N.E.2d 1321 (1984)*. See *Grace, supra at 310* ("There is no doubt that a motion judge should give serious consideration to the credibility of a recanting witness's new testimony"). If Hampton "were to testify at a new trial, his credibility would be damaged in such a way by earlier testimony that his new testimony would be relatively worthless." *Commonwealth v. Waters, 410 Mass. 224, 231, 571 N.E.2d 399 (1991)*, quoting from *Ortiz, supra.* The judge did not err in finding no substantial risk that Hampton's testimony at Russ's trial would have affected the verdicts at a new trial for the defendant.

[*8] 2. *Ineffective assistance of counsel*. The defendant also contended in his new trial motion that trial counsel was ineffective for failing to introduce a statement attributed to Lampley concerning Lampley's alibi. Lampley told the police officers who interviewed him after the shooting that on the evening of the murder, he had gone for a walk in the neighborhood with his girl friend and some of her friends, returned to his residence at 23 General Patton Drive, and watched movies. Lampley later took a polygraph test. On the "Polygraph Unit Database Information Form," State police Sergeant Christopher Dolan, who administered the test, wrote, "During the post test interview the examinee admitted to lying about his alibi." However, despite defense counsel's vigorous and repeated efforts to elicit Lampley's admission that he lied about his alibi or that he said so to Dolan, Lampley refused to make any such admission.

After Lampley testified at trial, defense counsel indicated that he intended to call Dolan as a witness to impeach Lampley's testimony with evidence that Lampley admitted to Dolan that he had lied about his alibi. However, when counsel later spoke with Dolan, Dolan reported having **[*9]** no memory of this statement. Trial counsel elected not call Dolan as a witness because Dolan was "not ready to offer anything." The defendant now claims that counsel was ineffective for failing to advocate for the admission of Dolan's notation on the form, either as a past recollection recorded or as third-party culprit evidence.

A past recollection recorded is admissible if "(1) the witness has no revivable recollection of the subject, (2) the witness has firsthand knowledge of the facts recorded, (3) the witness can testify that the statement was truthful when made, and (4) the recording was made when the events were fresh in [his or] her memory." *Commonwealth v. Nolan, 427 Mass. 541, 543, 694 N.E.2d 350 (1998)*. "Where a new trial is sought based on a claim of ineffective assistance of counsel, the burden of proving ineffectiveness rests with the defendant." *Commonwealth v. Montez, 450 Mass. 736, 755, 881 N.E.2d 753 (2008)*. The defendant has not shown that he can satisfy the third requirement — that is, that Dolan could testify that the statement, "examinee admitted to lying about his alibi," was true. The defendant has not met his burden of proving defense counsel's shortcomings in this regard.

Likewise, the defendant has not demonstrated that counsel was ineffective for failure to gain the statement's admission **[*10]** as third-party culprit evidence. Otherwise inadmissible hearsay evidence may be admissible as third-party culprit evidence, but only if "the evidence is otherwise relevant, will not tend to prejudice or confuse the jury, and there are other 'substantial connecting links' to the crime." *Commonwealth v. Silva Santiago, 453 Mass. 782, 801 (2009)*, quoting from *Commonwealth v. Rice, 441 Mass. 291, 305, 805 N.E.2d 26 (2004)*. Dolan's notation was tangentially relevant at best — even if Lampley lied about his whereabouts on the evening of the murder, it does not follow that he was involved in the shooting. Moreover, testimony about Dolan's notation was likely to have confused the jury with collateral issues surrounding the inadmissible polygraph test itself. The judge was warranted in concluding that counsel's decision not to press further for the admission of the statement was reasonable.

Furthermore, even if we were to conclude that counsel's handling of this evidence was manifestly unreasonable, this conduct did not result in the loss of "an otherwise available, substantial ground of defence." *Commonwealth v. Rondeau, 378 Mass. 408, 413, 392 N.E.2d 1001 (1979)* (quotation omitted). The judge found that counsel "thoroughly cross-examined and impeached Lampley" and the evidence, if

admitted, "likely would not have affected [the jury's] deliberations." **[*11]** We agree. Counsel succeeded in eliciting Lampley's admission that he could not deny telling Dolan that he lied about his alibi. Defense counsel even argued in summation, without objection, "But what does he then admit to? I lied about the alibi. . . . This fellow knows the dogs came to his doorstep. So, what does he tell — what does he tell the police, albeit later he says it's a lie." Any further impeachment of Lampley by the introduction of Dolan's notation would have been "cumulative[, not] potentially dispositive." *Commonwealth v. Sarmanian, 426 Mass. 405, 407, 688 N.E.2d 973 (1998)*. See *Commonwealth v. Valentin, 470 Mass. 186, 190, 23 N.E.3d 61 (2014)* ("[G]enerally, the failure to impeach a witness does not, on its own, constitute ineffective assistance").

3. *Admission of defendant's letters*. Suspecting the defendant's involvement in the shooting, the police interrogated him about two weeks later. Because the officers failed to honor the defendant's invocation of his right to an attorney and his right to remain silent, his statements from the interrogation were suppressed. In the months that followed, the defendant wrote "hundreds" of letters to Schwenk from jail,[3] twenty-eight of which were admitted in evidence without objection. The defendant contends on appeal that all of the letters, and particularly those written before **[*12]** the defendant was appointed counsel with respect to the murder charges, were the product of police misconduct during the interrogation and should not have been admitted. We review this claim, and the claim that defense counsel was ineffective for failing to object, to determine whether any error created a substantial risk of a miscarriage of justice. See *Commonwealth v. Azar, 435 Mass. 675, 686-687, 760 N.E.2d 1224 (2002)*. We discern no error.

"[E]vidence need not be excluded under the fruit of the poisonous tree doctrine . . . if the connection between the improper conduct and the derivative evidence has become so attenuated as to dissipate the taint." *Commonwealth v. Fredette, 396 Mass. 455, 459, 486 N.E.2d 1112 (1985)*. "In determining whether the connection between the evidence and the improper conduct has become so attenuated as to dissipate the taint, the facts of each case must be examined in light of three factors: the temporal proximity of the arrest to the obtaining of the evidence; the presence of intervening circumstances; and the purpose and flagrancy of the misconduct." *Id. at 460*. We look to the first two factors "in conjunction with each other." *Commonwealth v. Damiano, 444 Mass. 444, 455, 828 N.E.2d 510 (2005)*. Substantial time elapsed between the interrogation and the writing of each of the letters, see *Commonwealth v. Prater, 420 Mass. 569, 582, 651 N.E.2d 833 (1995)* (concluding that ninety minutes was a sufficient "break in the stream of events" **[*13]** to insulate the confession from the misconduct), and we are confident that the connection between these events was sufficiently attenuated to dissipate any taint. Most significantly, the decision to write the letters was an "affirmative choice" of the defendant, *Commonwealth v. Long, 476 Mass. 526, 537, 69 N.E.3d 981 (2017)*, wholly independent from the prior police misconduct. See *Commonwealth v. Maldonado, 55 Mass. App. Ct. 450, 454, 771 N.E.2d 221 (2002)* (suppression motion properly denied where evidence obtained "only as a result of the defendant's voluntary, intervening act").

"As to the purpose and flagrancy of the illegal [interrogation], we ask, first, whether the police performed the illegal act for the purpose of obtaining the evidence that the defendant seeks to suppress, and second, whether the police knew that their actions were illegal but proceeded anyway (flagrancy)." *Long, supra at 537-538*. Here, the "police did not confront the [defendant] with the illegally obtained evidence in order to coerce" him to write the letters to Schwenk. *Id. at 538*. Additionally, as the motion judge found, "[Schwenk] was responsible for turning over the letters, a completely separate and distinct force that has no relation whatsoever to the poisonous tree." In short, the letters were obtained "by means sufficiently distinguishable to be purged **[*14]** of the primary taint" of the police misconduct. *Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)* (quotation omitted).

4. *Prosecutor's closing argument*. The defendant argues that three aspects of the prosecutor's closing argument were improper.

a. *Reference to letter*. The defendant argues that the prosecutor improperly referred to one of the defendant's letters, Exhibit 51, in summation.[4] The defendant objected at trial that the argument assumed facts that were untrue and drew an impermissible inference. He makes a different claim

[3] The defendant was in custody pending the disposition of unrelated criminal charges.

[4] The prosecutor argued,

> "The DNA test is inconclusive for [the defendant], Mr. Lampley or Mr. Hampton. Exhibit 51, ladies and gentlemen. [The defendant] writes, and I quote, 'This case is so fucking stupid. I didn't have a glove or fucking **[*15]** black hoodie.'
>
> "Well, how does he know about the glove? How does he know about the black hoodie? Aside from the fact, doesn't that explain — isn't that completely consistent with the test that's inconclusive for it to be [the defendant's] on the glove?"

on appeal, arguing that he learned about the glove and hoodie from the officers who interrogated him, and that the prosecutor was therefore exploiting the suppression of the interrogation when he invited the jury to draw the inference that the defendant knew about these items from his personal involvement in the crime. See *Commonwealth v. Harris, 443 Mass. 714, 732, 825 N.E.2d 58 (2005)*; *Commonwealth v. Scott, 470 Mass. 320, 333-334, 21 N.E.3d 954 (2014)*. Because the defendant did not make this objection at trial, we review any error for a substantial risk of a miscarriage of justice. *Harris, supra at 730*. We discern no such risk.

Whether the defendant learned about the glove and the hoodie during the police interrogation or, later, from discovery in the case,[5] the evidence did not support the prosecutor's argument that the defendant had independent knowledge of these items. Nonetheless, a new trial is not warranted. The rhetorical question about the defendant's knowledge was merely a passing comment and not an emphasis of the argument. The evidence of the defendant's participation in the crime was amply supported by the ballistics evidence, by Schwenk's and Parsons's testimony, and by the numerous inculpatory statements in the defendant's letters. We are confident that this line of argument had no material effect on the verdict.

b. *Use of telephone records*. Parsons and Schwenk both testified that they received telephone calls from the defendant on the day of the murder. In addition, records reflecting calls made from a telephone registered to one Mary Nunn Evans **[*16]** were admitted as evidence. In closing argument, the prosecutor referred to two of these calls very close in time to the shooting — one to Schwenk's telephone and one to a telephone registered to Rebecca Bartholomew[6] — with no objection from defense counsel. The defendant argues that because the records do not show telephone calls made from any telephone number associated with him, the prosecution misled the jury in relying on these calls during closing, resulting in a substantial risk of a miscarriage of justice.

"In closing argument, a prosecutor may analyze the evidence and suggest reasonable inferences the jury should draw from that evidence." *Commonwealth v. Semedo, 456 Mass. 1, 13, 921 N.E.2d 57 (2010)*. The judge concluded that there was a "sufficient basis in the record for the Commonwealth to draw the reasonable inference that the defendant placed the phone calls that came from the phone number registered to 'Mary Nunn Evans.'" He further noted that "use of a phone is not exclusive to the person to whom it is registered; phones may be borrowed or accessed without permission." We agree with the judge that the prosecutor's argument was based on a reasonable inference drawn from evidence admitted at trial. The defense was equally free to argue **[*17]** to the jury that such an inference was unwarranted.

c. *Mischaracterization of DNA results*. At trial, State police chemist Kristin Zaramba testified that the glove recovered at the crime scene "yielded inconclusive [DNA] results for comparison with [the defendant,] Todd Lampley, and Devarus Hampton" — meaning that the DNA sample did not contain "enough information . . . to positively include or exclude a person from [it]." The defendant, relying on *Commonwealth v. Mattei, 455 Mass. 840, 920 N.E.2d 845 (2010)*, and *Commonwealth v. Cameron, 473 Mass. 100, 39 N.E.3d 723 (2015)*, argues that this testimony described "nonexclusion" results rather than "inconclusive" results, and its admission and use in the prosecutor's closing argument, see note 4, *supra*, was erroneous, creating a substantial risk of a miscarriage of justice.

The defendant's reliance on *Mattei* and *Cameron* is misplaced. In both cases, the DNA analyst testified that a source of DNA was "consistent with" the defendant's DNA, and that although the DNA test could not provide a complete match, the results also could not exclude the defendant. See *Mattei, supra at 848-849*; *Cameron, supra at 103, 105*. This "nonexclusion" testimony "could suggest to the jury that a 'link would be more firmly established if only more [sample] were available for testing.'" *Id. at 106*, quoting from *Commonwealth v. Nesbitt, 452 Mass. 236, 254, 892 N.E.2d 299 (2008)*. Here, Zaramba's **[*18]** testimony did not "permit[] the jury to make an inference about the defendant's relation to the sample." *Cameron, supra.*

Zaramba and the prosecutor accurately referred to the DNA testing as "inconclusive." However, even "for inconclusive DNA evidence to be admissible, it must be probative of an issue of consequence in the case," such as the integrity of the police investigation. *Nesbitt, supra.* Here, "testimony regarding inconclusive DNA results [was] not relevant evidence because it [did] not have a tendency to prove any particular fact that would be material to an issue in the case." *Commonwealth v. Cavitt, 460 Mass. 617, 635, 953 N.E.2d 216 (2011)*. Accordingly, the inconclusive DNA evidence from the glove should not have been admitted or mentioned in closing.

[5] Schwenk testified that this particular letter was written in May, 2008 — about six months after the interrogation, five months after the defendant was indicted, and three months after he was appointed counsel. See *Commonwealth v. Watkins, 375 Mass. 472, 482, 379 N.E.2d 1040 (1978)* (opportunity to consult an attorney was an intervening circumstance that "overshadowed" temporal proximity of prior, illegally obtained statements).

[6] The defendant told Schwenk that he got into "Becky's" car after he got out of Schwenk's car, that is, after the shooting.

Nonetheless, we discern no substantial risk of a miscarriage of justice. Zaramba's testimony "neither suggested to the jury that the defendant was in any way linked to the DNA found on the [glove], nor implied that the defendant's DNA would have been found there if more of a sample had been present." *Id. at 636*. To the extent the prosecutor argued that the inconclusive result was consistent with the defendant's guilt, such argument was improper, but we are confident that "the inconclusive DNA evidence **[*19]** relating to the [glove] would not have influenced the jury's conclusion." *Ibid*.

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Massing, Shin & Ditkoff, JJ.[7]),

Entered: August 4, 2017.

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[7] The panelists are listed in order of seniority.

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS. Supreme Judicial Court
SJC-11459

COMMONWEALTH OF MASSACHUSETTS,
Appellee

v.

ROBERT UPTON,
Defendant-Appellant

M.R.A.P. 16K Certification

I hereby certify that this brief complies with the following Massachusetts Rules of Appellate Procedure: M.R.A.P. 16(a)(13) (addendum); M.R.A.P. 16(e) (references to the record); M.R.A.P. 18 (appendix to the briefs); M.R.A.P. 20 (form of briefs, appendices, and other documents); and M.R.A.P. Rule 21 (redaction).

This brief was composed using Courier New font, size 12, with 10 characters per inch, with no more than 50 pages counting towards the page limit.

Signed under the pains and penalties of perjury this 26th day of April, 2019.

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COMMONWEALTH OF MASSACHUSETTS

Barnstable, SS. Supreme Judicial Court
SJC-11459

COMMONWEALTH OF MASSACHUSETTS,
Appellee

v.

ROBERT UPTON,
Defendant-Appellant

CERTIFICATE OF SERVICE

I, Elizabeth A. Sweeney, Assistant District Attorney for the Cape and Islands District, hereby certify that I have served a PDF copy of the Commonwealth's Brief to the Clerk of the Supreme Judicial Court, and a copy to defense counsel via TylerHost online service:

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Signed under the pains and penalties of perjury this 26th day of April, 2019.

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